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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~601~~ 2414.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEVERE, BY HIS NEXT FRIEND, WILLIAM B. SEVERE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 26, 1905.

(19,731.)

(19,731.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 631.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEVERE, BY HIS NEXT FRIEND, WILLIAM B. SEVERE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

ALLAN L. McDERMOTT, Receiver, &c., Appellant,
vs.
CHARLES E. SEVERE, by Next Friend.
No. 1464.

a Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
No. 45838. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration, &c.*

Filed December 18, 1902.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
At Law. No. 45838.

The plaintiff, a minor, by his next friend, his father, William B. Severe, sues the defendant, Allan L. McDermott, as receiver of the City and Suburban Railway of Washington, a corporation,

I.

For that whereas heretofore, to wit, on the 31st day of August, 1902, the defendant, as receiver as aforesaid, by appointment of the

supreme court of the District of Columbia, affirmed by the circuit court of the United States for the District of Maryland, and as a common carrier was in possession of and was controlling, a certain line of railway partly in the District of Columbia and partly in the State of Maryland, upon which said line of railway the defendant, as receiver as aforesaid, on, and prior to, said day was engaged in the transportation of passengers by means of cars propelled by electricity, and for that on said date, to wit, on the 31st day of August,
2 1902, the plaintiff was lawfully upon a certain public crossing on and over said line or railway, at or near a certain station on said line of railway, in the State of Maryland, known as Riverdale, over and upon which said crossing persons were accustomed to pass and repass on foot as well as in vehicles, and while plaintiff was so lawfully on said crossing, the defendant, through his agents and employés, in charge of a certain car going at a high rate of speed toward the city of Washington, District of Columbia, so negligently and carelessly operated said car, that the plaintiff, while lawfully upon said crossing, as aforesaid, and exercising due care and caution on his part, was run into and struck by said car, and thereby and by reason of the negligence and carelessness of the defendant aforesaid, through his agents in charge of said car as aforesaid, the plaintiff was injured in and about his left foot and leg so that it became necessary thereafter to have said leg amputated at or about the knee, whereby the plaintiff was caused great pain and suffering and was seriously and permanently injured in and about his said leg, and suffered and still suffers and will continue to suffer great pain and agony, all to the damage of the plaintiff in the sum of $25,000.00 wherefor- he brings this suit.

And the plaintiff claims the sum of $25,000.00 besides costs of suit.

A. S. WORTHINGTON,
WM. M. LEWIN,
Attorneys for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth
3 day, exclusive of Sundays and legal holidays, occurring after the day of service hereof, otherwise judgment.

A. S. WORTHINGTON,
WM. M. LEWIN,
Attorneys for Plaintiff.

Plea.

Filed January 16, 1903.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
} At Law. No. 45838.

The defendant, for plea to the plaintiff's declaration in the above entitled cause, says he is not guilty as alleged.

J. J. DARLINGTON,
Attorney for Defendant.

4 *Joinder of Issue, &c.*

Filed January 20, 1903.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
} No. 45838. Law.

The plaintiff joins issue upon the defendant's plea to the plaintiff's declaration.

A. S. WORTHINGTON,
WM. MEYER LEWIN,
Attorneys for Plaintiff.

To J. J. Darlington, Esq., attorney for defendant:

Please take notice that the issues joined in this cause will be tried at the next term of this court.

A. S. WORTHINGTON,
WM. MEYER LEWIN,
Attorneys for Plaintiff.

5 *Amendment to Declaration.*

Filed March 1, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff, *vs.* ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.	At Law. No. 15838.

By leave of the court first had and obtained the plaintiff amends his declaration in this case by adding thereto the following count:—

II.

For that whereas heretofore, to wit, on the 31st day of August, 1902, and for a long time, to wit, six months prior thereto, the defendant as receiver as aforesaid by appointment of the supreme court of the District of Columbia, affirmed by the circuit court of the United States for the district of Maryland, and as a common carrier, was in possession of, and was controlling, a certain line of railway, partly in the District of Columbia, and partly in the State of Maryland, upon which said line of railway the defendant, as receiver as aforesaid, on said day and during said period was engaged in the transportation of passengers by means of certain cars propelled by electricity; and for that on said day and during said period
6 there was at or near a certain station known as Riverdale on said line of railway in the State of Maryland, a certain public crossing which said crossing then and there consisted in part of boards or planks placed on, over and across said track, and that it then and there became and was the duty of the defendant to maintain said crossing in a safe and skillful manner, yet the defendant on said day and during said prior period neglected its said duty in that regard, in this, that it so maintained said crossing that there was a space between said boards and one of said rails of the defendant's said track of such dimensions that a person passing over or otherwise lawfully upon said crossing was liable to have his foot caught in said space, so as to make it difficult to speedily withdraw his foot from the same, and for that on said day, to wit, the 31st day of August, 1902, the plaintiff while lawfully upon said crossing and while in the exercise of due and proper care on his part had his left foot caught in said space, so that he could not withdraw it therefrom, and while the plaintiff was using every reasonable effort to extract his foot therefrom, the defendant, through his agents and employés in charge of

a certain car passing over the defendant's said tracks toward the city of Washington, so negligently and carelessly operated said car by failing to keep a proper lookout, and by failing to keep said car under proper control when approaching said crossing; and by failing to promptly stop said car when the plaintiff's said situation was observed by the persons in charge of said car, and by running said car at said time at an excessive, dangerous and unlawful rate
7 of speed, and otherwise, that by reason of such negligence the plaintiff was run into and struck by said car and thereby and by reason of all of said negligence and carelessness of the defendant in the maintenance of said crossing and in the operation of said car as aforesaid, the plaintiff was injured in and about his left foot and leg, so that it became necessary thereafter to have said leg amputated at or about the knee, whereby the plaintiff was caused and will hereafter be caused great pain and suffering, and whereby also the plaintiff so long as he lives will be put to great inconvenience and distress, and will be prevented from entering upon any gainful occupation suited to his abilities, all to the damage of the plaintiff in the sum of twenty-five thousand dollars, wherefore he brings his suit.

And the plaintiff claims the sum of twenty-five thousand dollars, besides costs of suit.

A. S. WORTHINGTON,
Attorney for Plaintiff.

Endorsed.

Leave is hereby granted to file the within amendment to the declaration.

JOB BARNARD, *Justice.*

8 Supreme Court of the District of Columbia.

THURSDAY, *March* 31, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. MCDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
At Law. No. 45838.

Come here again the parties aforesaid, in manner aforesaid and the same jury respited yesterday who, after the case is given them in charge, upon their oath say they find said issues in favor of the

plaintiff, and assess his damages, by reason of the premises, at fifteen thousand dollars ($15,000.00)

And, in answer to the interrogatories submitted to them for their consideration, they answer as follows:

1. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing? they answer Yes.

2. Was the defendant guilty of negligence in the improper management of the car? they answer Yes.

3. Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank? they say they cannot agree upon an answer thereto; thereupon counsel for the plaintiff consent that the jury
9 may answer said third interrogatory in the affirmative, but said jury was discharged from further considering said interrogatory.

* * * * * * *

MONDAY, *April* 4, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

CHARLES E. SEVERE, &c., *v.* ALLAN L. MCDERMOTT, Receiver. } At Law. No. 45838.

* * * * * * *

It is ordered that the January term, 1904, be, and hereby is, prolonged for the period of thirty-eight days for the purpose of settling bills of exception in the above-entitled cause.

Stipulation of Counsel, &c.

Filed May 6, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff, *vs.* ALLAN L. MCDERMOTT, Receiver of the City and Suburban Railroad Company of Washington, a Corporation, Defendant. } At Law. No. 45838.

10 It being inconvenient for the counsel in the above entitled cause to dispose of the pending motion for a new trial therein and as the time fixed by the rules of court, within which a bill of

exceptions should be signed, will expire on the 18th instant, it is hereby agreed by and between the counsel for the respective parties that if the motion for a new trial shall be overruled that the judge who presided at the trial may sign a proper bill of exceptions in said cause at any time prior to the 10th day of July next. Dated this 5th day of May, 1904.

A. S. WORTHINGTON,
Attorney for Plaintiff.

C. C. COLE,
Attorney for Defendant.

Supreme Court of the District of Columbia.

TUESDAY, *June* 14, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLEN L. MCDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant. } At Law. No. 45838.

11 Upon consideration of the motion of the defendant for a new trial heretofore submitted to the court, the same is hereby overruled, and judgment on verdict ordered: Therefore, it is considered that the plaintiff recover against the said Allan L. McDermott as receiver aforesaid the sum of fifteen thousand dollars ($15,000), with interest thereon from this date together with the costs of suit to be taxed by the clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals, and the bond for costs is fixed in the penalty of two hundred and fifty dollars.

Upon motion of the defendant, the time within which to file the transcript of record in the appellate court be, and hereby is, extended until the 1st day of September, 1904.

Memorandum.

June 27, 1904.—Appeal bond filed.

12 *Stipulation of Counsel.*

Filed June 30, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe,
vs.
ALLEN L. McDERMOTT, Receiver of the City and Suburban Railroad Company of Washington, a Corporation. } At Law. No. 45838.

It is hereby agreed by and between the parties to this suit, by their respective attorneys, that the bill of exceptions in this cause as agreed upon by said attorneys shall be filed in the clerk's office, and an order entered in the minute book of the filing thereof, and that the same has been taken under advisement by the court, and as the judge who presided at the trial is now out of the jurisdiction and will not return until about the first of August that he may sign said bill of exceptions after his return to the jurisdiction any time prior to the 6th day of August, 1904.

June 30th, 1904.

C. C. COLE,
B. W. PARKER,
For Defendant.
A. S. WORTHINGTON,
Of Counsel for Plaintiff.

13 Supreme Court of the District of Columbia.

SATURDAY, *July 9th*, 1904.

Session resumed pursuant to adjournment, Mr. Justice Gould, presiding.

This cause was tried by Justice Barnard.

CHARLES E. SEVERE, &c., Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver, Defendant. } At Law. No. 45838.

The bill of exceptions herein having been presented to the court, pursuant to the stipulation of counsel filed June 30th, 1904, providing for the filing and submission of said bill, the same is hereby taken under consideration.

* * * * * * *

Supreme Court of the District of Columbia.

MONDAY, *August 1st*, 1904.

Session resumed pursuant to adjournment, Hon. Job Barnard, justice, presiding.

* * * * * * *

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Surburban Railway of Washington, a Corporation, Defendant.
No. 45838. At Law.

14 Comes now the defendant by his attorneys and having heretofore presented the bill of exceptions taken at the trial of this cause, pray: that the same be signed and made of record now for then, which is accordingly done.

15 *Bill of Exceptions.*

Filed August 1, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, Plaintiff,
vs.
ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Defendant.
At Law. No. 45838.

Bill of exceptions.

Be it remembered that at the trial of this cause the plaintiff to maintain the issue on his part joined offered the testimony of the following witnesses, who, having been first duly sworn, testified in substance as follows:

EDDIE SEVERE, son of William B. Severe, ten years old lives at Riverdale; remembers the day Erickson was hurt; that at the time the accident happened he was up at the house and Raymond came up and told him about it; that he ran down and the car was coming then and they saw it was too late, so when the car came down he waved his hat and tried to stop it; that he did not get down to the station, but near it; that the car was coming from Riverdale; that when he first saw the car he got within ten feet of the track; that

when he got there and saw the car was coming he waved his hat and hollered for them to stop; that when he did this the car was about as far as over to that corner (indicating)—(this distance was measured and is forty-six feet six inches); that the
16 motorman didn't start to stop until it got down near Erickson; that he did not see what the motorman did when he waved his hat; that while he (the witness) was doing this (waving his hat) Erickson was right at the track with his foot caught; that there is a platform—just a board platform—on both sides of the road; that there is a crossing there that goes across the trolley car track; that it doesn't go across the railroad; that the crossing is made of boards; that his brother's foot was caught in about the middle or near the middle; that the track was going like that, and there was another board in there and he had his foot there and when the car was coming he bent over like this and the car ran right across him; that the car stopped, after it struck him, past the crossing; that the car dragged his brother a good ways from the crossing about as far as from here down to that little rail (indicating), a little ways down from the power house; that when he ran down and waved his hat he didn't pay any attention to what Raymond did; that there were only the three boys there when his brother had his foot caught; that his parents were on that day in Cape May; that it was on a Sunday; that his grandfather was at the house; that the colored girl went away just before the three boys left the house; that she had gone off on the cars a pretty long time before the accident happened; that they did not go down to the station with her, but were down there a little before her, and she came down after they were there; that he went back to get a drink of water; that it was not very long after that that Raymond came running up
17 there for him about a few minutes when Raymond came running up; that he was just going out of the yard by the gate; that Raymond did not come clear up to the house, just as far as the gate; that Raymond told him that Erickson's foot was caught down at the track, and he ran down there and at the time he got there the car was coming; that he did not go all the way up to his brother after the car had struck him; that his brother's foot was caught between the rail and the boards of the crossing.

On cross examination he testified:

That the accident occurred in the summer about two o'clock; that just three boys went down to the station first about one thirty o'clock and that no one else was with them; that they stayed down there about an hour or something like that; that they were first over by the power house, sitting down on a step waiting, and after a while they went over to the track; that they did not stay on the track very long; that after they were on the track he went up to the power house; that he went on the platform with his brothers; that he left his brothers on the platform, when he went up to get a drink of water; that he went up to the house to get a drink of water with the intention of coming back to wait for his mother; that he

went within about ten feet of his brother; that he did not step on either of the tracks, but on the two boards over a little ditch there; that there was a little ditch before you came to the railroad; that that was about as near as he went to his brother while he had his foot caught in the platform; that his foot was caught in the rail on the right side as you face Washington; that when he
18 got in that position, as he walked on the board across the ditch, the car was about as far from him as it is to that other side there (indicating) 50 or 60 feet; that when he got there and walked on those boards he waved his hat and was hollering for them to stop; that he did not notice what the motorman was doing at the time he waved his hat; that he continued to stand on the boards over the ditch until the car struck his brother; that he stood about the same distance from the tracks; that there is a house that is used by the railroad company as a power house; that it is a little distance towards Washington from that platform; that when the car struck his brother it carried him to about the middle of the power house, but that is not very far; that the car stopped soon after it struck his brother; that after his brother was struck he was kind of sitting up opposite the front part of the car by the second wheel of the front; that there is no place to get off on the other side of the back platform to walk down to the Baltimore & Ohio tracks; that there is a kind of a path, but it has no boards; that there is no platform or nothing over on the other side of the road next to the Baltimore & Ohio tracks; that there is one house below there a piece, but that at that point there are no houses on the side of the electric railway next to the Baltimore & Ohio; that it is woods after you get to the Baltimore & Ohio—a little woods; that from the trolley tracks to the Baltimore & Ohio tracks it is about as far as (indicating) about 15 or 20 feet; that as you leave the trolley tracks there is a pretty steep place there; that there is no road there but a path; that when he got down
19 near the tracks and began to wave and holler the car was about as far from the Riverdale end of the platform as that post (indicating); that he couldn't tell exactly how far it was away; that it was about as far as from him to that post with the distance from him to that table added and (that distance was measured and is 28 feet); that it was pretty near the platform when he began to wave and holler; that he and his brothers were not in the habit of playing down there on the railroad tracks; that they played down there on that day, but that they were not playing on the railroad tracks or on the platform; that they were playing by the power house; that they went over to the platform and just stood there looking to see if the car that his mother was on was coming; that they were not in the habit of going over there on the track and playing; that he saw that opening in the track before his brother got his foot caught there; that he had gone across the track before, but never played there; that he went across the track and went down to the lake and branch about a half a mile from there; that he never

went down to the track to play, but a few times went down to the power house; that the power house is about as far from the track as (indicating) 15 or 20 feet; that he used to run across the trolley track and the railroad track down the hill to the other side; that he would not run across the trolley track, but would walk across; that he used to play in that gutter between the railroad tracks and the trolley tracks; that between the two railroads there is a hollow
20 where he used to go to play, and in so doing had to cross the trolley tracks; that he never got his foot caught in that place.

On re-direct examination the witness identified a photograph of the scene of the accident and pointed out on the photograph the point where the plaintiff was when his foot was caught and the place where the witness stood when he waved to the motorman and testified that he went down to meet his mother because she said she would be home Sunday evening.

JOHN E. BURCH testified: that he was a blue printer; that he lived in Berwyn, just beyond Riverdale; that he had lived there for about fifteen years; that he was familiar with the Riverdale crossing; that he got on the car which caused the accident at Berwyn; that it was either the last Sunday in August or the first Sunday in September; that he was in either the last seat or next to the last on the left hand side of the car coming to Washington; that the car stopped with a jolt such as to make him rise up and look out of the window; that he saw two little boys out on the bank and heard them crying that the car had run over Charlie's leg; that the first truck had already passed over his leg; that the motorman and conductor picked him up and put him on the front platform of the car and brought him to town; that he thought the injured boy was about the middle of the car; that the rear end of the car was about one half its length from the platform; that it was a closed car; one of those large green cars that run up G street to 15th; that the bones were sticking out I suppose two or three inches and it, the leg, was merely hanging by a muscle: that the prin-
21 cipal injury was about half way between the knee and ankle; that when he first felt the jolt the brakes were put on; that the jolt was unusual enough to make him get up out of his seat; that he could not tell about how far the car went after he first felt this sudden jolt before it stopped; that when he first felt the jolt he could see the little sub-station there by looking out of the side windows up in the front part of the car; that he saw two little boys out on the side just about the time the car stopped, on the right hand side as you come in; that they were up on the little embankment there on the side of the track right close to it 10 or 15 feet away; that they were jumping up and down and hollering; that the track was straight he supposed for 500 yards or more from the crossing towards Riverdale; that there was nothing that he could see in the way at that time to keep the motorman from seeing the crossing; that it was in the afternoon about two or three o'clock.

On cross examination he testified that the windows were open; that he did not see anything of any of the boys until the car had either stopped or was about to stop; that he could have seen them if he had been looking; that the car was stopped quickly after he felt the jolt; that it was the unusual jolt that attracted his attention; that the injured boy was lying on the ground about midway of the car he thought; that it was his estimate that the rear of the car when it stopped was about half the length of the car from
22 the crossing; that he meant by the sub-station the little building there that was used for the distribution of power. Mr. Worthington agreed that it was not a station for the use of passengers.

On re-direct examination he testified: That the cars always stop at the crossing whenever there is anybody to get off or on there; that he noticed signs there on each side of the track up against a post right at this crossing "Cars stop here;" that the sign had been there ever since he could remember; that he examined the space between the rail and the planking there; that it was such that a child could get its foot caught in it; that the space was about the same width all the way along on the side where the boy caught his foot; that he didn't measure it; but that he guessed it was about three inches or something like that.

On re-cross examination he testified: That all he knew about the width of this space was his estimation of it by looking at it.

23 WILLIAM B. SEVERE testified that he was superintendent of the mail bag repair shop Post Office Department; that he has lived at Riverdale three years; that during that period he had been coming into town on that line of cars; that on the day the accident happened he was at Rehoboth Beach with Mrs. Severe; that they got back about midnight; that Saturday they had anticipated returning about two o'clock that Sunday afternoon and had so notified their household; that when he got home he did not see the injured boy; that he saw him the next day, Monday afternoon, at the hospital with his leg amputated; that they had always used the crossing; that they habitually took the car there; that he noticed that other people went to the same point to get on the cars and that the cars stopped to let off passengers going either way at the platform; that there was a sign on the trolley pole right between the tracks "Cars stop here;" that the sign had been there as long as he could remember; that all the time he had been living there the cars had been making that their stopping place; that when he and his wife went to Rehoboth Beach they left behind his father, colored cook, colored man, his brother, who was in town at the time, and his four boys, (the oldest of whom was away at school that afternoon), who composed his household.

The witness was here asked by plaintiff's counsel what instructions he gave his boys as to going on the railroad track, but upon objection being made by defendant's counsel that this was immaterial, the question was withdrawn.

The witness further testified that he observed the place
24 where his boy was hurt; that he went down and examined it very closely; that he noticed where his foot had been caught between the flange of the rail and the board of the platform; that there were drips of blood all along the track for about 12 feet or more; that the drippings of blood on the platform commenced near the end towards Washington; that he measured it with a tape line one day shortly after the accident; that the width of the space where he saw the drippings of blood was about three inches; that the boy was wearing shoes that day; that the witness has the shoe the boy wore (and thereupon produced the shoe in open court); that he recognized it as the boy's shoe, which he had on at the time of the accident. (And said shoe is hereby made a part of this bill of exceptions.)

Counsel for the plaintiff offered to prove by the witness that in October following the accident the defendant filled in with gravel the space between the planks and the rail where the plaintiff's foot was caught, but on objection by defendant's counsel the evidence was excluded.

On cross-examination he testified that he measured the space between the planking and the rail some time in October of 1902; that he could not get the measurement exactly with a tape line as there was nothing but inches and half inches marked on it; that it was over two and one-half inches about three inches by the tape line as near as he could remember; that the same plank is there today as was there then, and it was in exactly the same position and the same rail was there; that he got leave for ten days and went to Cape May; that in coming back failed to make connection to reach Washington Sunday; so that he went to Rehoboth Beach and stayed there until Sunday afternoon at five o'clock.

On re-direct examination he testified: That the distance from the crossing where the boy's foot was caught to his house was, he guessed,
25 about four to five hundred feet; that he would say it was about 400 feet from the platform to the lines of his yard; that from the gate to his house was close on to two hundred more.

WILLIAM B. SEVERE, recalled for further direct-examination, testified: That at the time he made the measurements at this place he made a plat and a copy; (the witness produces the paper) that the space between the board and the rail according to the measurements was two and eleven-sixteenths inches, that was from the top of the rail to the edge of the platform.

On cross-examination the witness testified: That from the near side or edge of the rail to the edge of the platform, top opening, was two and eleven sixteenths inches; that the opening below from the edge of the platform to the center of the rail was three and one-fourth inches; that that was the "T" rail.

On re-direct examination the witness testified: That the depth of

this opening between the boards and the rail at the time he examined them was about two inches from the top of the boards; that he presumed the boards were about 2 inches thick; that he didn't measure them carefully.

On re-cross examination witness testified: That he didn't know the exact dimensions of the hole as he had not measured it; that the thickness of the board is the depth of the hole; that there was no filling in there at the time of the accident that he could note; that there was some sometime in October; and that what he said on his direct examination on that subject was not that he made his measurements of the crevice in October, but that in October the company filled in the crevice between the plank and the rail with gravel.

Thereupon counsel for defendant stated that while that was ruled out on the direct examination of the witness he would not object to it now.

The witness on further cross-examination testified: That he examined the crevice a day or two after the accident, and had several friends examine it also; that his measurements were made,
26 he thought, in September the 7th or 10th; that the thickness of those boards would be the thickness of the opening; that in some cases the dirt filled it up even to the top of the ties; that the top of the board was about level or very nearly so with the top of the rail; that he used a tape line to make measurement on that day; and that the smallest measurement on it was one-half inch; that he also used a rule; that he had forgotten that; that it was by the rule that he knew it was two and eleven-sixteenths inches from the edge of the board to the inner edge of the top board of the rail, that the board was between the tracks and that the hole was upon the tracks; that there were boards on either side of the rail as well as between; that those on the outside were very near to the rail.

Mrs. KATIE E. SEVERE, the mother of these boys, testified that Eddie would be eleven next November; that the boy who was hurt, the one they call Erickson, would be nine next October; that Raymond would be seven in June; that they had lived out there over three years; that during that time they had been using this line of cars to come in and out of the city; that they had been in the habit of taking the cars right at what we call the substation, the power house; that she meant by the sub-station the power house; that there was a platform there where they could get off and on; that the platform was just a crossing; that the platform was on both sides of the track; that it crosses all four of the rails of
27 trolley tracks and extends outside of them; that there was a sign there on the post "Cars stop here"; that everybody in that locality used that platform both for getting on and getting off; that the day the boy was hurt she was away and got back about mid-night Sunday; that she wanted to get home earlier, but could

not make connection; that she sent word that she would be home in the afternoon; that she notified them at home that she expected to get there some time Sunday afternoon, but they couldn't tell exactly because they had been already delayed.

CHARLES E. SEVERE testified: That he was eight years old and lived in Riverdale for about three or four years; that when he got hurt he was down there on the crossing; that it was a warm Sunday, in the last of August, about two or three o'clock in the afternoon; that that afternoon he was down there waiting for his mother; that he was on a little step sitting down in front of the door of the power house; that he did not know how far those steps he had been sitting on were from the trolley track; that he guessed about two or three feet; that Raymond and Eddie were sitting there with him; that they thought they heard a car coming and looked out to see if it was coming and there was none coming; then Eddie ran up to the house to get a drink of water and Raymond's foot got caught; that he did not see what Raymond was doing when he got his foot caught; that he didn't notice him until he was caught, but then he (Raymond) told him and he helped him out and just as he was going back his foot got caught in the rail as he was crossing over to the station; that his foot was caught in the middle part of the platform;
28 that Raymond's foot when he was caught was sort of slanting and witness could just twist it out, but witness' foot was across like this (indicating) and he couldn't get it out any way; that he couldn't get his foot out; (produces and identifies the shoe he had on at the time of accident); that Raymond went up to tell Eddie that he couldn't get his foot out and Raymond met him at the gate and Eddie came running down, and that just as he got to that little ditch with two boards there he (Eddie) saw the car coming and so did he (witness); that his back was to it; that when he heard the car coming he turned his head to look and see if it was a car and he was waving his hand; that he could not see the car while he was waving; that when he first saw the car it was about as far from him as it is to that post (indicating the same post referred to by the witness Eddie) at time of accident; that Eddie was down there when he saw it; that he Eddie, was waving his hat up and down and hollering to the motorman; that Raymond came down behind Eddie; that he was waving too, both of them; that he heard Eddie holler for the man to stop; that he couldn't see whether he (the motorman) was stopping until he (motorman) got close to him, and then he noticed him and didn't notice him before; that he saw him turn the brake to stop it; that he saw the car stop; that then he was right by the middle of the power house; that it is about two or three yards from the place where his foot was caught; that that is about as far as he was dragged.

On cross-examination he testified: That it was his left foot
29 that was caught; that he saw Eddie when he first got down there on the two boards; just as soon as he stopped on the

two boards; that he never saw the car until Eddie got down there; that when he saw Eddie he turned around, and just noticed the car about as far from him as from here to that post (indicating the same post before referred to); that he saw Eddie first and just as he was getting ready to turn around he saw the car; that he did not wave his hat any until he saw the car; that Eddie began to wave his hand just the same time he did; that when he first saw the car it was right close on him; that Eddie commenced waving about the same time; that as soon as he saw Eddie waving he turned his head and saw the car and it was right on him, as near as the post; that he had not heard the car before he saw it; that he was down there on that crossing a good deal; that he thought the car was coming and was running down there to see if the car was coming; then it seemed to them as if they heard the car and they ran down there to see if it was. Witness was running across the track to see, and when Raymond got there his foot slipped in some way or other and then witness stopped and pulled Raymond's foot out, and Eddie was up at the house calling to grandpa where was the cup; that he did not go down there often before that day and play on that platform; that he never went there to play in front of the cars; that he went down there a good deal and went across there going down to the branch sometimes to go fishing.

JAMES SEVERE, a witness called by and on behalf of the plaintiff having been first duly sworn, testified: That he was the father of William B. Severe and grandfather of the boys; that at the time the accident happened to the little boy he was living at his son's house; that he supposed it was in the neighborhood of three o'clock Sunday afternoon; that he remembers Eddie coming up to the house just before the accident happened; that he, the witness, had just fastened the screen door, and was going up stairs when he heard Eddie rattle at the door; that he didn't go up stairs until Eddie went away; that it must have been fifteen minutes or something like that before he heard of the accident.

On cross-examination the witness testified; that it may have been more than fifteen minutes after Eddie went to the house before he heard of the accident.

On re-direct examination the witness said it might have been less than fifteen minutes; that he couldn't tell exactly.

The counsel for the defendant thereupon admitted that the defendant Allan L. McDermott was on the 11th day of October A. D. 1901, by an order passed on that date by the supreme court of the District of Columbia, in a case then therein pending wherein The United States Mortgage & Trust Company, The United States Electric Lighting Company, The Anacostia and Potomac Railroad Company and The Columbia Railway Company were complainants and The City and Suburban Railway of Washington, was defendant, being equity cause No. 22663 in said court appointed as receiver of The City and Suburban Railway of Washington, and that on the 14th

day of October, 1901, by an order of the circuit court of the United States for the district of Maryland passed upon an ancillary bill filed in said last mentioned court by the said complainant
31 against the same defendant the said appointment of the said defendant as such receiver by the supreme court of the District of Columbia was ratified, approved and confirmed by the said circuit court of the United States for the district of Maryland and that during all the time from and after the date of the passage of the order last aforesaid to and including the time of the trial the said defendant was in possession of and operated and controlled the said City and Suburban Railway of Washington under the direction of the said courts.

The plaintiff's brother, Raymond, who was six years of age at the time of the trial was offered as a witness for the plaintiff, but the presiding justice, after questioning him held that he had not sufficient capacity, on account of his youth, to justify having him sworn as a witness in the case.

Counsel for the plaintiff offered in evidence the Carlisle tables of mortality, as bearing upon the plaintiff's expectation of life, but on objection to them being made by defendant's counsel, the offer was withdrawn.

The defendant's counsel admitted that the railroad company put the planks down that make the crossing in question, and that the defendant as its successor, was responsible for it.

Here the plaintiff rested.

32 And thereupon the defendant, to maintain the issues on its part, introduced the following evidence:

George M. Walker testified: That he resided in Hyattsville about four hundred feet from the line of Riverdale; that he was familiar with the locality where the accident is said to have occurred; that he had walked up and down the tracks there in the neighborhood of it very many times; that there was a street laid out down to the railroad; that there was no street on the other side of it; that the Baltimore & Ohio railroad was about thirty-five or forty feet from the electric road; that the Baltimore & Ohio and electric tracks were nearly parallel there at that point; that the Baltimore & Ohio was on the east side of the electric road; that the land along there between the electric tracks and Baltimore & Ohio tracks varied by a depression there; that in some places it was very deep and in some places it was above grade line; that at the crossing it was probably twenty inches or so from the platform of the electric cars off down to about two feet or more; that the street was not open or used on the other side of the railroad; that it stopped abruptly at the platform.

On cross examination he testified: That there was no possible way of driving across there, and hardly a way to walk across; that he was not employed by the railroad company; that he was summoned by the railroad company.

(It was subsequently admitted by counsel for the defendant that this witness voluntarily appeared without a subpœna.)

33 The witness further testified on cross examination that he had no doubt that people cross there, but did not suppose that it was used habitually; that it was a very uneven place to cross over; that he couldn't say that no one used it; that there may have been a small foot path that ran down east of that crossing; that he didn't notice; that witness may have crossed there once or twice himself; that it was very difficult passing, but he had crossed there

ERNEST F. HAWKINS testified that he was a motorman of the Washington Railway & Electric Company; that he had been a motorman ever since the line had been in operation; that he was motorman on the car that injured the boy; that the car was running on the Washington bound track at the time; that he saw the boy before he was injured; that he saw him when he was about three or four poles back—about three or four hundred feet—the poles that trolley wires are run on; that he did not know how far apart the poles were; that when he first saw the injured boy there were three boys there on the tracks running and jumping backwards and forwards across the tracks; that they were on the platform or crossing; that he sounded his gong as he approached where they were; that he was back about one hundred and fifty feet when he first sounded his gong; that when he rang his gong two of the boys got back on the bank; that the other one stayed there standing on the track; that he rang his gong repeatedly from the time he first rang it until he reached the boy, but didn't know how often; that when he saw the boy was not going to get off the track he was about

34 thirty or thirty-five feet away from him; that he was pretty close on him when he made no effort to get off; that he applied the brakes with all his power and reversed the power; that to reverse the power causes the wheels to turn backwards and it stops quicker; that after he reached the point where he saw the injured boy was not likely to get off the track that he applied the brakes to the best of his ability and reversed the power and he stopped the car as quick as he possibly could; that there was no means upon the car for stopping it which he did not use; that when the car came to a stop it was a little south of the crossing the boy was on, before the accident, a little towards Washington; that before the accident the boy was near the Washington end of the crossing; that after the car stopped he got off the car at the back end; that the back end of the car was at or near the south end of the platform; that the boy was south of the crossing about opposite the center of the car; that the boy was put on the car, brought into Washington to 15th and G streets, and transferred from there to the Emergency Hospital wagon, that he had often seen the boy before on the track at that crossing and at Riverdale station and anywhere along between that crossing and Riverdale; that he had seen him remain on the track after he sounded his gong while the

car was approaching him; that he did not know how often that boy would stand on the track until the car got almost to him and then he would jump off and clap his hands and laugh at the motorman lots more than once; that he had seen this boy in company with other boys do the same thing; that he does not know how
35 often he had seen this, but lots of times; that the first thing he saw or heard on the occasion of the accident that indicated that the boy might not get off the track was that he saw his foot hung; that he was then about thirty or thirty-five feet from him; that all he saw was three boys running back and forth; that he did not see them making any motion; that he did not hear any of them screaming at any time.

On cross examination he testified: That he had known the boy's face for a couple of years; that he knew the faces of the other boys around there; that he knew the two boys who were with him were his brothers because they all favored one another; that there was a family resemblance; that that was the only way he knew; that there was no other boy there except these three boys; that he didn't see any other person at the crossing except the boys; that they continued to run backwards and forwards until he got within one hundred and fifty feet of them; that all three of them were running backwards and forwards across the track, playing, running and jumping across the track; that he was traveling at about eight or nine miles an hour; that one boy stopped on the track and the other two boys got off when he rang the bell; that the two boys got off on the side next to the sub-station; that the boy who remained on the track remained stationary from that time on until he was struck; that the other two boys were over on the bank; that neither of the other two left their place from the time the injured boy became stationary until the car struck him, he thought, not to his knowledge; that when he got down near the boy who was struck the other two boys were over on the bank on the right hand side;
36 that he did not know whether they were standing together or not; that he did not see either of those boys wave; that the boy whose foot was caught did not wave to him; that the boy was standing with his face towards him; that he does not know whether the boy turned around or not, but that he saw his face; that he did not recognize him until after he was struck; that the boy's face was towards him before he was struck; that it was broad day light; that he didn't know at that time that the boy was one of the three boys—not until he got off; that he didn't recognize the other two boys before he struck the plaintiff as being two of these three brothers; that he made a statement in writing to the company about the affair; that the rules of the company required him to make such report; that he made it on that evening after the accident; that he had not seen it since he made it; that he had not made any statement to anybody since he made the written report, nor to any agent of the company except to counsel. At the request of counsel for plaintiff counsel for defendant handed him the written report re-

ferred to by witness and the same was read to the jury and is as follows:

Accident Report No. —.

C. & S. Md. Division.

Name of person Charlie Severe. Address Riverdale.

Vehicle { Owner —— ——. Address —— ——.
Driver —— ——. Address —— ——.

Color White Sex Male Age —.

37 1. Date August 31–'02. Time 3.06 p. m. — m.
2. Place (at crossing between streets): Name street? Riverdale, sub station.
3. No. of motor 403 No. of trailer — Direction bound west
4. Was car stopping, standing, starting or running? Speed — miles per hour 6 miles per hour.
5. Position of person or driver, and what doing just before and at time of accident standing perfectly still. Made no signal that he was fast in track.
6. In what manner did person undertake to get on or off car? —.
7. What signals, if any, were given by person? None whatever.
8. Was person injured, if so, state nature of injuries? Leg cut off.
9. What did person say at time of accident? Take me home to mama, my foot is cut off.
10. Was person able to walk? No.
11. If removed from place, how and where taken? To Emergency hospital on the car to 15 and G Sts.
12. Kind of vehicle — Single or double — Number — Direction bound —
13. Speed of animal or vehicle, walking, trotting or running? — miles per hour —
14. Number of persons in vehicle? — — —
15. Damage to vehicle or injuries to animal? — — —
16. Number of passengers on car at time of accident? 5 passengers.
17. Position of conductor, and what doing just before
38 and at time of accident? On rear platform.
18. Position of motorman, and what doing just before and at time of accident? Trying to stop all I could.
19. Was any other car near or passing at the time of accident? No. If so, give number and name of crew?—
20. State of weather? Clear. Condition of rail good.

Motorman's Statement of Accident.

On my Berwyn trip, 3.00, p. m., when at Riverdale near sub sta. D noticed 3 boys playing on the track. One of the boys was standing on the track as though he was going to move off at any time. He was standing perfectly still. When about 40 ft. I could see his foot was fast in the track. I immediately applied brakes. Seeing they was not going to stop car I reversed the current, stopping about 6 or 8 ft. past after cutting his leg off.

Residence Brookland, D. C. Signature E. F. Hawkins.

Badge No. —."

Witness further testified: That there is a bank on the west side of the road that came down to the railroad to a little incline; that the bank was then about two feet high; that the other two boys got off the track and were off on the bank; that they were just standing there with their arms down; that both of them had their hats on; that he did not know how they were dressed; that the length of the car he supposed was between thirty-six and thirty-eight feet; that he saw that the boy's foot was caught before he struck him; that he did not know whether his left foot was in between the
39 track and his right foot outside and turned around, but he saw the boy's face.

On re-direct examination he testified: That when the boy was standing on the track, as if he were going to move off, was not the first he saw him; that when he first saw him he was playing and running across the track.

JOHN GREENSMITH testified: That he lived at Newport News, Virginia; that he had been for nine years general foreman of the maine machine shop of the Newport News Shipbuilding and Dry Docks Company of Newport News; that he was on the car that injured the boy; that his attention was called to the motorman by his ringing the bell repeatedly; that he looked out and saw a small boy; that is he saw a larger boy than the boy that was injured, in the center of the track, to the best of his knowledge and belief; that it was a good while ago and many events have happened since; that the boy he saw in the center of the track was waving his hand; that he then turned away and didn't look out until after that for he did not think anything of it as he had often seen the same thing occur in other places; that he did not see the little fellow; that the next thing that occurred was that the motorman stopped his car; that that was what called his attention to the front of the car again; that the car just jumped, you could feel a jolt; that he believed the motorman was trying all he knew how to stop the car; that the motorman was putting on the brakes with all the effort he could; that he thinks he stopped the car within 30 seconds or less—not

over; that the wheels were slipping; that he could not say
40 how many times the gong was rung before he looked out; that it was the repeated ringing of the gong that called his attention to it; that at that time the boy was standing in the center of the track; that he did not see the boy that was run over at all; that he only saw one boy; that he was riding in the front part of the car in the second seat facing the motorman; that his face was to the motorman's back; that he was simply taking a pleasure ride.

On cross-examination he testified: That he was sitting on the left hand side; that the car had glass windows and doors; that he could look down the track; that when he first looked out he was fifty or possibly thirty-five feet from the place where the car stopped or it might have been a little further or less; that the boy was about as far from him as to the corner of that room (indicating the same corner referred to by Eddie Severe); that he could look down the track and see on both sides of it where the boy was for some distance; that there was no body in sight that he saw except the one boy; that there were not three boys running across the track and playing that he saw; that he saw that there was only one boy; that he was not standing still; that he was waving his hand; that he did not see any other boy; that he couldn't see the boy that was injured for the reason that the motorman was there and he couldn't see on that side; that he couldn't see down the track on the side where the motorman was; that the boy he saw standing waving his arms was a little larger than the boy that was injured according to his recollection; that he did not notice whether the boy that
41 stood in the middle of the track had a hat on; that when he first saw the boy the motorman was ringing his gong and that was what attracted his attention; that he then saw the boy wave and the next thing he noticed was the sudden jolt when the motorman applied the brakes, and that was what made him turn around and look and just about a moment after he put the brakes on there was a jolt and the car raised up; that he couldn't say how far the car had gone from where he first noticed the boy before he felt the brakes.

MAURICE E. SPALLING testified: That he was a conductor on the City and Suburban Railroad Company, and had been for eight years; that he was on the car that injured the boy; that he did not see the boy before he was injured; that at the time the accident happened he was on the rear platform of the car; that he noticed the sudden stopping of the car, which was a good deal more sudden than usual; that the rear end of the car was just at the end of the platform when it stopped; that when he stepped out of the car he stepped on the platform; that the injured boy was opposite about the center of the car.

A. S. BRYANT testified: That he lived near Berwyn; that he had lived there not quite a year; that he lived in the neighborhood of Berwyn at the time this accident happened; that he was on the car that injured the boy in either the first or second seat from the
42 rear on the left hand side coming towards Washington; that as he approached the place where the accident occurred he got up and walked across to the opposite side and looked out of the window; that the car at that time was between sixty and one hundred yards from the place where the injury occurred; that he could see the crossing as he looked out; that when he looked out he saw three boys standing on the platform on the edge near the substation; that they were on the right hand side of the track the car was running on; that there were three boys just standing there; that he did not think they were near enough to the track so that the car would strike them; that they might have been though; that he did not observe all the time until the car got down there; that he just looked out and walked back to his seat; that he hadn't sat down until the car ran over the boy; that he had his hand resting on each seat on each side of the aisle as well as he can recollect; that the car stopped very suddenly; that he thought that probably caused him to stand there instead of sitting down right away; that he got off the car at the rear door; that the rear wheel of the car was standing on the seventh tie from the Washington end of the platform of the car; that he doesn't remember how near the end of the platform of the car was to the end of the platform he stepped off on.

On cross-examination the witness testified: That there used to be a pond there on the right side of the road; that he doesn't remember whether he had got down opposite to the pond or not when he looked out of the window; that he didn't think they were quite to the pond; that they were somewheres about that point; that
43 nothing had happened to the car to attract his attention when he looked out; that it was not because of any noise made by the ringing of the gong or anything of that kind that made him look out; that when he looked out three boys were standing absolutely still on that little platform; that he didn't see them running; that if they had been running backwards and forwards across he probably would have seen them; that the nearest boy was probably a few feet from the track; that he just glanced out of the window and started back to his seat; that he didn't take notice whether the bell was ringing long before the car began to stop; that he didn't recollect any bell; that it may have rung, but he didn't notice it; that he didn't recollect that it had rung at all; that he counted the ties from the rear wheel back to the platform.

THOMAS W. PHELPS, having been duly sworn testified, on behalf of the defendant: That he was and had been for about four years a motorman of the City and Suburban line; that he had been running there continuously ever since the road started, and was familiar

with the place along where the accident happened; that he was not acquainted with the Severe boys, but (upon seeing the boys in court) he recognized the little boy on crutches; that he didn't know about the other two; that he couldn't remember whether prior to the accident he had seen the injured boy standing upon the track; that he had frequently seen boys playing along the track; that they would jump out and run across ahead of the cars; that he had seen them stopping and standing on the platform and stopping the cars as they would go along and then running away laughing after the motorman had stopped; that he had observed this at this particular place and at all the stations along there and that it was a frequent occurrence.

HARRY T. KNIGHT, called by and on behalf of the defendant, being first duly sworn, testified: That he was a map engraver at the Geological Survey, and had resided at Riverdale for six and half years; that his house was in the same block with Mr. Severe's, about two hundred and fifty feet away; that he knew the Severe boys prior to this accident and he had occasionally seen the three young Severe boys playing, talking, and standing on the railroad tracks down near where the platform is and where the accident happened; that he couldn't tell exactly what they were doing, but he had seen them with his own boys running around the platform and off and on; that he could not say that he had ever seen the boy who was injured standing on the track and jumping off as the car approached; that he had seen the Severe boys, his own boys and other boys prior to this accident standing on the track at that point as the car approached and jumping off as it did approach; that he couldn't say how many times he had seen that done prior to the accident, but that it was quite often during the summer; that that was the time he was at home most.

On cross examination witness testified: That his boys, who mingled with the Severe boys, were eight and eleven years old; that he took precautions to stop his boys from playing there after this accident; that he had reproved them before the accident; that when he saw these boys around there "they would run backwards and forwards along on the platform and around the power house. In fact they made it a regular play ground;" that it occurred right often when the boys would stop in front of a car and when it would come up they would jump off just before it got there; that when the boys were doing this he was in his garden; that the corner post of his garden was within thirty feet of the railroad track; that when the boys were on the track the motorman would not do anything except ring his bell, and then the boys would jump off.

JAMES B. LACKEY, called by and on behalf of the defendant being first duly sworn testified: That he was secretary of the defendant company; that he went to the scene of the accident about half past four o'clock on the Sunday it occurred. The following questions

were then put to the witness and the following answers were given by him:

Q. You are the secretary of this company, I believe? A. Yes sir.

Q. And also of each one of these other street railway companies here, except the Capital Traction? A. Yes, sir.

Q. I would like to know whether you went to the scene of this accident soon after it occurred, and if so, how soon? A. I should say I was there about half past 4 o'clock; between 4 and 4.30.

46 Q. Was that on the day of the accident? A. Yes, sir; on Sunday afternoon between 4 and 4.30 o'clock.

Q. I wish you would tell us whether, at that time, you measured this space between the track and the board, where this boy is said to have gotten his foot caught? A. I did.

Q. How wide was it? A. It was a scant 2⅛ inches.

Q. How did you measure it? A. I measured it by putting my heel in it. I tried to shove my heel down into this point; but I couldn't get the heel into it. I didn't have a rule and I shoved my heel down to see if I could get it down. The heel would not go in.

Q. How much did your heel measure at the widest point? A. At the widest point it was a scant 2⅛ inches. That is as much as I could get into the hole.

Q. How much do I understand that the heel you had on at that time measured, at the widest point? A. The widest point up here (indicating) would be about 2⅛ or 2⅜ inches.

Q. At the point where you could get it into the space how much did it measure? A. A scant 2⅛ inches.

Q. Where it would go in? A. Yes, sir.

47 Q. Where were you when you measured the heel? A. At my office the next morning.

Q. And with the same shoe that you had on the day before? A. The same shoe. I did not have a rule with me on Sunday.

Q. At what point in the track did you make this measurement? A. My best recollection is I measured it off with my two feet like that (indicating) and it was about 22 or 24 inches from the Washington end of the platform.

Q. Why did you select that point? A. I examined the crossing, and from that point towards Berwyn there was no indication that there had been anybody or anything dragged across, that scraped on the platform except at that point.

Q. You measured at the place where the scraping of the platform showed itself? A. Yes, sir.

Q. Did you notice whether that space was the same or about the same all the way along, across the platform? A. It may have varied an eighth of an inch or a quarter of an inch, maybe.

The shoe produced by the plaintiff as the one he had on the injured foot at the time of the accident was then shown witness and he testified that he measured it yesterday and that at the widest

point the shoe measured a scant two inches; that when he made the measurement at the place of the accident Mr. Mersheimer was
48 with him; that the crossing that they have there is the standard crossing of street railroads in this city; that he has been secretary of this company for five years and for some of the others for a longer period. As bearing upon the opportunity he had to learn of accidents which occur on the road he testified that before 1901 he supervised the claims department, which was then under a claim agent, and since 1901 he had had charge of it directly; that prior to this accident no other accident which occurred in like manner had come to his attention; that no accident from getting their foot caught into one of these openings between rail and boards had ever happened to anybody else that had come to his attention and they had never had one since that; that the day he made the measurements he did not measure the depth of the hole; that he observed that the bottom of the place was gravel.

On cross-examination the witness testified: That he was not an engineer and had nothing to do with the operation of the road or construction of it, but he observed in relation thereto that they did not have such construction within the city limits; that it is all underground construction within the city limits; that they have a crossing like the one in question on the Columbia and on the Bennings road, and some on the City and Suburban; that the nearest crossing to this one, which is like it, is just this side of the District line; that, after you turn at Fourth street, northeast, and go towards Hyattsville there are several of those crossings on that line; that where the railroad track runs along a public street you put down gravel or something solid, but where
49 a public street crosses the private right-of-way board-crossings are put down; that they put in the planks at this place because the right of way deed required it; that there was a subdivision of this piece of property and the deed which gave them the right of way said that wherever a street was shown they had to put a plank crossing; that it was put there because they had to do it according to the deed and not for people to walk on; that there is a post there marked "Stop here" and that it is a stopping place if there is anybody to get on; that they could not walk along there; that the crossing was not put there for the use of people when they get off and on the cars; that they used it for that purpose a great deal; that when the people are coming from Washington they come down to this station and get off there, that the people did use the platform; that it was of standard construction where there was a crossing.

On redirect examination the witness having identified the papers giving them authority to run over that street testified that that plank was laid in pursuance of the requirements of the papers.

There was then proved and offered in evidence the following papers referred to by the witness, to wit: An order of the county commissioners of Prince George's county, Maryland, in the words and figures following, to wit:

EXHIBIT J. B. L. No. 1.

Ordered this 7th day of November, 1895, by the county commissioners of Prince George's county that permission be and is
50 hereby granted unto the Columbia and Maryland railway, a corporation, duly incorporated, to use the bed of any street or streets and to cross any streets in the several subdivisions and towns known as Wilen Heights, Holliday, Riverdale Park, Romona, College Park, Lakeland, Lansburg, Kane & Company, Beltsville Land Improvement Company, Muirkirk, Lafayette, Berwyn and Fairlawn, provided said Columbia and Maryland railway has acquired or shall hereafter acquire by grant or condemnation the fee in said streets from the corporations or individuals owning said subdivisions for the purpose of a right of way for the said railway and also in any case where said railway has the consent of the proprietors of said subdivision to so use said streets and provided further that said railway company shall comply with section 234 of article 23 of the Code of Public General Laws and provided further that nothing herein contained shall be construed as an assumption of obligation of the county commissioners to repair or take charge of said streets.

I hereby certify that the aforegoing is a true copy of an order passed by the county commissioners of Prince George's county.

In testimony whereof, I hereto set my hand and affix the seal of said county commissioners.

[SEAL.] THOMAS E. WILLIAMS,
Clerk County Comms., Prince George's County, Md.

Also an agreement between the Riverdale Park Company, Samuel S. Bond, and the Maryland Traction Company, in the words
51 and figures following, to wit:

This agreement, made this 25th day of July, A. D., 1898, between Riverdale Park Company, Samuel S. Bond, parties of the first part, and the Maryland Traction Company, a body corporate, party of the second part,

Witnesseth, that the said Riverdale Park Company, Samuel S. Bond in consideration of the sum of one dollar to each of them in hand paid by said Maryland Traction Company, the receipt whereof is hereby acknowledged, hereby respectively agree to grant, release and convey unto the party of the second part the right of way over and along Maryland avenue, being a street laid out and located in the subdivision known as Riverdale Park, Prince George's county, Maryland, for the railway of said Maryland Traction Company, the said street being fifty feet wide, and also agree to duly grant and convey for the purpose of widening said street a strip of land ten (10) feet wide from the front of their respective lots, fronting on said

Maryland avenue, as shown on plat number 34 of the right of way records of said party of the second part, and to execute and deliver proper grants and conveyances of the same, with an unencumbered title, when demanded, upon the following conditions:

1st. That the railroad of said party of the second part shall be constructed in such a way, with plank street crossings that vehicles can readily cross its tracks at intersections of the said street with any other street.

2nd. That the space on the west side of the railroad tracks
52 after leaving sufficient room for the road bed and tracks of the said party of the second part shall be graded and so arranged that vehicles can pass along the same parallel with the said railroad.

3rd. That the cars of said party of the second part shall not be kept standing at the said street intersections so as to prevent the free crossing of said railroad by vehicles.

4th. That the said party of the second party, agrees to stop its local trains at the said street crossings on signal to take on or let off passengers.

Witness the hands and seals of the said parties of the first part, and the signature of the authorized representative and corporate seal of the said party of the second part.

Test: RIVERDALE PARK CO.,
By J. BLUNDON. [SEAL.]
SAMUEL S. BOND.
MARYLAND TRACTION COMPANY,
(Signed) By W. KESLEY SCHORPF.

Also a plat of Riverdale, Maryland, which is hereby referred to and made a part of this bill of exceptions. And it was proved that the City & Suburban Railroad Company is the successor of the Maryland Traction Company and of the Columbia and Maryland railway.

Mr. WORTHINGTON: "I admit the street was not open there and was not used by vehicles." The witness further testified that Maryland avenue had never been opened so as to be used by vehi-
53 cles; that there was no travelled street laid out there in Maryland avenue at that point; that there is no way along there for a wagon to pass; that he couldn't say nobody walked along there.

FRED J. MERSHEIMER, called by and on behalf of the defendant, being first duly sworn testified; that he was a special agent of the claims department of the railroad company; that he observed Mr. Lackey try to put his heel in that space and observed the situation of the land there; that Mr. Lackey could not get his heel into that space; that he saw the measuring of the heel in the office the next morning; that it measured two and one-eighth inches; that he had

been connected with street railways since 1883, as adjuster of claims, claim agent, and special agent with this company and other roads; that he had observed plank crossings on street railroads; that in the District of Columbia it was a general observation; that he saw more of them in New Jersey; that he had more to do with suburban roads there; that there were none of these plank crossings within the city proper; that he knew that crossing in question was practically the same as all other plank crossings; that he had occasion to observe that they are all the same, particularly as to the distance between the rail and the first plank; that the standard construction generally averages about two inches; that they are not constructed mathematically accurately at that distance, but they are uniformly about two inches; that in his experience prior to the accident a similar accident caused by a person getting a foot caught in the
54 space between the rail in the track had never come under his observation; that no such accident since this one had ever come to his attention.

On cross-examination the witness testified: That he was not an engineer or had nothing to do with the roads or crossings; that the space was just about wide enough to force Lackey's heel in it; the grooves in the rails laid in the streets of the city of Washington he judges are about one and one-half inches wide; that Mr. Lackey could not get the narrow part of his heel down into the space at the crossing in question if he put his foot down flat, but by lifting his toe up he might, of course, get the back or narrow part of his heel in; that said space was just about wide enough to force the boy's heel in; that he judged that the boy's heel was about the size of boys' heels generally.

W. H. H. ALLEN called by and on behalf of the defendant, being first duly sworn, testified: That he had resided in Washington seventeen years; that he had been a railroad contractor for twenty-six years; that he had done general construction, laying tracks, ballasting, etc., that he was a member of the firm of Talty & Allen; that that firm had the contract for laying and ballasting the road bed of the City & Suburban; that he was familiar with the point of the accident; that the ballast is rock; that the size of the rock ballast was from two to two and one-half inches; that the largest piece would be about two and one-half inches and from that down to a very small size; that the ballast is about eight inches deep;
55 that the ballast is put in between the ties to bind them to the surface of the road-bed; that he was familiar with the plank crossing in question; that he was on the construction of it every day; that that plank crossing corresponded with the general and usual way of constructing plank crossings across electric railways; that it was the standard way of putting in a crossing.

The distance between the inside of the rail and the plank according to standard construction on street railroads is about two and one-eighth inches; that on steam railways it is 2¼ or 2½ because the

wheels have a little more tread; that the space was left because if anything got in on the track like a piece of ballast the flange would strike it and press it down, so that it would not derail the car; that a piece of stone tightly wedged between the planking and the rail that the wheel could not press down would derail the car; that the space is left for the purpose of guarding against the danger of derailment; that in his experience he had supervised the construction of a great many crossings; that he had been on construction work for forty odd years.

On cross-examination witness testified: That they always worked on plans and specifications and had a copy of them; that it said that they should put in plank crossings at so much per thousand; that he didn't recollect whether or not they showed how much space should be between the planking and the rail; that there was a regular rule to go by; that they had a regular space; that he didn't recollect whether that rule was contained in the specifications and plans; that the reason for leaving this space of two inches or
56 two and one-eighth instead of a smaller space is that if a stone gets in there it might not derail the car with a wide space, but if it is smaller and a stone gets in there it would derail the car; that the witness did not know but that a stone two inches or two and one-eighth inches wide getting into that space would be more liable to derail the car than a stone one inch wide getting into a one inch space; that they have to regulate the size of their space by the size of the stones; that the stones were from two to two and one-half inches, and generally give them a two inch space; that in the course of time these stones work out on the side, but you have to keep working on that to keep them in good repair; that if the stones should work out it would leave the space deeper; that they have to keep the road in repair because between the ties the ballast may work out and settle down, and they have to take the plank up and fill up the low place; that if this was not attended to the road would wear out of surface; that he did not observe this particular crossing after it was constructed; that when it was turned over to the railroad company it was inspected and was perfectly satisfactory to the company; that he had put these plank crossings in the line that runs out to the District line on the Great Falls road, and on the City and Suburban that runs out to Chesapeake Beach; that in all of them they have made the space between the plank and the rail two inches to two and one-eighth; that the size of the largest stone used in ballast has nothing to do with determining the space there of two
57 and one-eighth inches; that on the outside they put the plank close up to the rail; that the only difference is the space required by the flange.

HARRY W. FULLER, called by and on behalf of the railroad company, being first duly sworn, testified; that he was general manager of the Washington Railway and Electric Company; that he had been general manager since February 1901; that he was in Jersey

City with the North Jersey roads for seven years; that he had been in the street railway business since September 1891; that he had a broad general knowledge of what is considered good practice in railroad construction; that he was not familiar with the plank crossing at Riverdale except to know that there was a plank crossing there; that he had passed over it; that in constructing these plank crossings across street railroads in general construction the space left between the plank and the inside of the rail for flange space is from two to two and one-half inches; that as far as his knowledge and observation went that it was general and usual that the thickness of the flange that ran in the groove was 15/16 inches.

On cross-examination the witness testified; that the flange tapered toward the outer rim; that he gave the thickness of the heaviest part of the flange; that the flange at a level with the surface of the rail was ⅞ of an inch and tapered to practically nothing; that it is of peculiar shape; it is a little bit round rather than coming to a sharp edge; that in the city they have a space for the flange one inch wide.

On re-direct examination the witness testified that in the
58 city they had a guard and a grooved rail; that the guard is practically continuous from one end to the other; that the rails are put on cast iron yokes and firmly bolted in place; that tracks on roads similar to the City and Suburban are spiked to the ties; that the difference was because of the underground construction and the over-head construction; that they were not able to hold the rails as closely to gauge where they spike them to the ties as where they bolted them to cast iron yokes; that for safe construction for the play of the flange there should be left the space from two to two and one-half inches, depending on the weight of the flange; our flanges are light.

GEORGE W. DE RENE called by and on behalf of the defendant, being first duly sworn, testified: That he had been road-master on the Washington Railway and Electric Company for five years; that he had supervision of the road department, road beds, and over-head construction and everything pertaining to that department; that he was familiar with the usual construction of plank crossings over suburban roads; that he had had twenty years' experience in constructing railroads; that he was familiar with the plank crossing where the accident happened; that the crossing was the regular standard crossing that is put in all over the country on electric roads; that there is a universal standard of space left between the inner side of the rail and the planking; that it was from two inches to two and one-fourth inches; that the trackman's gauge of a crossing is the width of three fingers past the first joint;
59 that this is the universal gauge throughout the United States.

On cross-examination the witness testified: That as to the three-fingered measurements, when the witness measured he used his own

fingers; that if a man whose fingers are larger than the witness' is sent to make the measurement he uses his fingers; and that as to how that is when a smaller man is sent, they don't generally use dwarfs for construction work; that this standard is not written down or in print anywhere as far as he knew; that he did not know of any standard about the depth of it; that he was not familiar with the standard width of the flange; that that belonged to the mechanical department; that the plank fits right up close to the outside of the rail.

ERNEST F. HAWKINS recalled for further examination, testified: That from the sub-station looking towards Washington, you could see a car coming towards you about two squares or about five hundred feet; that at the time this accident happened there was not any car in sight coming from Washington; that before he reached the platform it was about five minutes since he had met the car going out from Washington.

FRED J. MERSHEIMER, recalled for further direct examination, testified: That he had not measured, but observed the depth of that hole on the day of the accident; that it was filled up with sand and dirt or gravel, and that it came up so that he could not
60 see the under side of the board; that you could not look down and see the ties; that there is about thirty feet of space between the Baltimore and Ohio tracks and this track; that when you step down here (referring to the crossing in question) you step down probably about twenty inches and then it goes down deeper into a gully or ditch; that that gully was approximately four feet deep; that there is a rise again of probably about two feet and then there is another depression; that as you approach the Baltimore & Ohio tracks you have got to walk up; that there is a wire, which he believed, was used for pulling switches, about eighteen inches or two feet from the ground; that if you wanted to get to the Baltimore & Ohio tracks you had to step over that wire; that there were no houses beyond the Baltimore & Ohio tracks; that it was woodland and lowland; that there were no houses between the electric tracks and the Baltimore & Ohio tracks; that there was no street there; that if you wanted to walk along here (referring to the place at or near the crossing) you had to walk between the tracks; that he couldn't see at the time of the accident that there were any evidences of people walking from the electric tracks towards the Baltimore & Ohio tracks at that point that there was no path across there.

On cross-examination the witness testified: That he did not observe any evidence of a path there; that he had looked for the same; that in the direction of the Baltimore and Ohio tracks he looked all along there to see what the character of the ground was; that he stood on the platform on the track there and looked as far

as he could see; that it was thirty feet or so, and that he
61 could see no evidence of a path; that the platform was fully four feet higher than the lowest part of the depressions.

And here the defendant rested.

And thereupon the plaintiff further to maintain the issue on his part, introduced the following witnesses, who testified as hereinafter stated:

WILLIAM B. SEVERE, recalled in rebuttal, testified that he had paced on a straight line the distance from the platform on the Washington side down to the power house; that it was about forty feet coming down this way at an angle; that he paced off the distance from the platform to the first post where the sign was; that it was about twenty-five feet from the platform to the edge of that post; that the sign "Cars stop here" was on both sides, so that on a car coming from Washington or going to Washington it could be seen; that he paced off the distance between these poles; that it was between ninety-five and one hundred feet; that the platform measured along the course of the road was about twenty feet; that the other way, witness said, is about thirty-two feet; that the width of the platform on the side towards the sub-station from the rail out to the edge of the platform is about eight or nine feet.

62 Thereupon, on the further redirect examination of the witness, the following occurred:

By Mr. WORTHINGTON:

Q. You have already testified about that space, where the boy's foot was cut off having been filled up in October after the accident? A. Yes, sir.

Q. I want to ask you now to what extent it was filled up, and to tell us how it was done.

Mr. COLE: That is opening up the whole case. My information is that nothing has been done there, and if there is any point to be made about that it may require me to bring my witnesses back here.

The COURT: I do not think we ought to go into that.

Mr. WORTHINGTON: I want to make my offer and take a ruling.

The COURT: I gave you a ruling the other day.

Mr. WORTHINGTON: I now offer it in rebuttal, and on an entirely different principle.

The COURT: I will exclude it.

Mr. WORTHINGTON: I would like your honor to hear the ground upon which I ask the question. I understand that the tendency of the evidence produced here to day may be that it is impracticable to have that place filled up on account of the flange coming down, and because they have to leave a space for the flange. Now when it is offered to show that a certain condition of things was danger-

ous, we have a right to show, in rebuttal, that it was fixed afterwards, that the road could operate with it after it was fixed, and that it was not necessary to keep it in the condition it was before the accident.

After full argument:

63 The COURT: I think you had better go on with this testimony.

Mr. COLE: If it stands here I have no objection to it. I understand we can prove nothing was done there, but if it stands where it is, I do not care about it, and will let it go. If he is to testify further in relation to this matter I want an opportunity to rebut it. My witnesses have gone, and I will have to send for them. I will not need all of them, but there are two or three of them I would have to have in order to prove that fact.

The COURT: What do you expect to show?

Mr. WORTHINGTON: I expect to show that after this accident happened that place was filled up, in the October following, so that it was impossible for a boy to get his foot down in there, and that it remained in that way from that time on.

After argument:

The COURT: He could get it down some distance at any rate, if it was not filled clear to the top.

Mr. WORTHINGTON: It might have been filled to the top of the plank and not filled to the top of the rail. The rail is higher than the plank.

Mr. COLE: Mr. Severe said they were about even. He said they were practically even.

The COURT: Let him state just what the depth was to which it was filled there.

By Mr. WORTHINGTON:

Q. State what filling was done in that hole, where the boy's foot was caught.

Mr. COLE: I reserve the exception.

The COURT: Yes.

A. The opening between the board and the rail, I have
64 stated, was about three inches, and between that they had filled it with sand and gravel, nearly to the level of the board.

Q. Nearly to what level of the board? A. To the top level of the board. I judge the board is about two inches thick, and that would be the depth of the hole.

Q. How did they do it; did you see it done? A. Mrs. Severe did.

Mr. COLE: I object to that and move to strike it out.

The COURT: Let that go out.

By Mr. WORTHINGTON:

Q. You saw that it had been filled? A. I saw that it had been filled.

By the COURT:

Q. How deep is that hole now? A. They have filled it in again since that. The rains have washed the sand and gravel out. I didn't take the exact date when it was done this last time; but I have noticed it in getting on and off the cars at this platform
65 every morning and evening; that he didn't know his boys ever got on the track and stood there until the car got near to them and then got off; that if it were so it had never come to his knowledge; that he had frequently given his boys instructions not to go near the tracks.

On cross-examination the witness testified: That he had not seen anybody fill up that space; that he never measured the depth of the space between the rail and the planking, and that all he knew of the depth was his estimate by looking at it, and judging from the thickness of the plank it laid on; that the last time he observed the depth of that space was the morning on which the witness testified; that at that time from the top of the planks down as far as you could put anything was two inches.

In response to a question by the court he said that from the top of the board down to the sand and gravel he would say that it was not more than one-half an inch, perhaps not that.

Mrs. KATIE E. SEVERE, recalled in rebuttal, testified that she has never before heard of her boys being on the track and standing in front of the cars or of their ever doing anything of the kind;
66 that she had repeatedly given them instructions about that ever since they had lived out there; that she had instructed them to keep away from the tracks; that she saw railroad men down about the space between the planks and the rail, where the boy's foot was caught, filling in; that they had axes and shovels; that she didn't know what they were putting in; that they were repairing the track and boards there; that she did not go down to see them.

EDDIE SEVERE, recalled in rebuttal, was examined and testified: That before this accident he had not been in the habit of going on that railroad track and standing there when the cars were coming, and jumping off before they got there; that he never did that in his life; that he never saw any of his brothers do it.

CHARLES E. SEVERE, recalled in rebuttal, was examined and testified: That he had not been in the habit of getting on the track before he was hurt and standing there when the cars were coming; that he never stood there when the car was coming until it got near

him and then jumped off; that he never saw any of his brothers do that, but that he saw a boy named Richard Garrison stand there until the car got right close to him and then he would jump off; that that was before he was hurt; that he saw him hopping the cars there a lot of times.

WM. MEYER LEWIN, called by and on behalf of the plaintiff, testified: That he was a member of the bar and of the counsel
67 for the plaintiff in this case; that he had lived at Hyattsville for eighteen or nineteen years; that he was familiar with the plank crossing of this road in that locality; that there are two crossings in Hyattsville, one called Melrose crossing, near witness' house, and the other up at the drugstore, the Hyattsville crossing proper; that two or three days after the accident happened he looked at the crossing at Riverdale, where the accident happened, and then looked at the crossing at Hyattsville, with regard to the opening where the flange ran; that the space at the crossing at Melrose and Hyattsville, was simply of the necessary depth for the flange; that it was like two dies one fitted into the other; that if there was a sheet of paper there it would be mashed down by the flange as it crossed; that at the place where the accident happened it was entirely different and was as has been described here, just the raw edge presented by this board; that the witness did not know whether the crossings at Melrose and Hyattsville were plank crossings, and did not know what was under the earth filling there, but just inside of the rails there was a board, and that was what he was speaking of; that there was no such opening in size in the crossings at Melrose and Hyattsville as there was in the one where the accident happened.

On cross examination the witness testified that he had never measured the opening between the rail and the plank at any point; that he did not know the distance between the rail and the edge of the plank, that where he looked at that he was able to say what the distance was between the rail and the plank because at Melrose he noticed that where the flange crossed there was a fresh place made; that he did not measure the distance at any of those
68 places between the rail and the plank; that he is able to say how much it was at any point if the evidence here is true about the width of the flange.

And here the plaintiff rested his rebuttal testimony.

And thereupon the defendant to further maintain the issues on his part recalled in surrebuttal a witness, FRED J. MERSHEIMER, who testified as follows: That the measurements, of the depth of the place where the boy got his foot caught, were made under his direction and in his presence within ten days or two weeks ago; that the depth at the time was one and three-fourths inches from the bottom of the gravel to the top of the rail; that at a crossing where there is quite some traffic by vehicles and otherwise, the dirt accumulates

and fills up the space in between, and the custom is to have men go along constantly and watch these places and clean them out; that wherever there is a crossing where the flange has worked its way through, if the boss finds it out the man is discharged.

On cross-examination the witness testified that he did not know when the last man had been discharged for such failure.

And here the defendant rested.

And thereupon, the foregoing being all the evidence given at the trial by either party the defendant prayed the court to instruct the jury as follows:

69 1. "The jury are instructed upon the whole evidence to return a verdict for the defendant." But the court refused to give said instruction and to the ruling and judgment of the court in so refusing the defendant excepted.

And thereupon the plaintiff requested the court to instruct the jury as follows:

1. "The jury are instructed that if they find upon consideration of all the evidence in the case that the plaintiff's foot was caught in the space between the planking and the rail at the crossing referred to in the evidence, so that he was unable to extricate his foot therefrom, they should render a verdict for the plaintiff, if they find that leaving the opening in the condition in which it was when the plaintiff's foot was so caught therein was not a reasonably safe method of maintaining the crossing, or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff h could have stopped the car before it reached the plaintiff.

"In considering the question of the liability of the defendant on either of the two foregoing grounds, the jury are instructed that they have a right to take into consideration the evidence tending to show that the place where the accident occurred was a public crossing and that it was frequented, and was known to the motorman in charge of the car to be frequented, by young children, as well as by older persons."

2. "The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such
70 sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury, and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct cause of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

And the defendant's counsel objected to the granting of each of

said instructions separately, but the court overruled the said objections and gave the said instructions to the jury. And to the ruling and judgment of the court in so overruling said objections and giving said instructions the defendant's counsel excepted separately to each ruling of the court upon each of said instructions.

And thereupon the defendant's counsel requested the court to instruct the jury as follows:

2. "If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his
71 foot caught between the rail and plank; and if they shall further find that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant."

But the court refused to give said instruction and to the judgment and ruling of the court in so refusing the defendant's counsel excepted.

And thereupon the defendant's counsel requested the court to instruct the jury as follows:

3. "If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the defendant's officers or agents, and that a reasonable prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

But the court refused to give said instruction and to the ruling and judgment of the court in so refusing the defendant's
72 counsel excepted.

And thereupon the defendant's counsel requested the court to instruct the jury as follows:

4. "If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had ample time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and the plank, and that as soon as the

motorman made such discovery he did all in his power to stop the car before it struck the plaintiff; and if the jury shall further find from the evidence that the crossing or platform at the place where the accident happened was constructed in the ordinary and usual way of constructing such crossing in the District of Columbia, and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the officers or agents of the defendant, and that a reasonably prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possble, but whether it was reasonably to be anticipated."

73 But the court refused to give said instruction and to the ruling and judgment of the court in so refusing the defendant's counsel excepted.

And thereupon the counsel for the defendant requested the court to instruct the jury as follows:

5. "If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the defendant's officers or agents, and that a reasonably prudent man would not have anticipated such an accident from such construction, then they should not find the defendant guilty of negligent construction. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

But the court refused to give said instruction and to the ruling and judgment of the court in so refusing the defendant excepted.

And thereupon the defendant's counsel requested the court to instruct the jury as follows:

74 6. ""If the jury find from the evidence that the motorman sounded the gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them; and if they shall further find that as soon as the motorman saw that the plaintiff probably would not or could not leave the track before the car reached him, he did all in his power to stop the car before it struck the plaintiff, and shall further find that the construction was not negligent, then they

should find for the defendant. And in determining whether the motorman should have commenced to stop the car before he did they may consider the fact, if they find it to be a fact from the evidence, that plaintiff and others were in the habit of standing on the track and leaving it as the car approached near them, and whether he saw any waving from anyone before he commenced to stop the car."

But the court refused to grant the said instruction and to the ruling and judgment of the court in so refusing the defendant's counsel excepted.

And thereupon, after argument of counsel to the jury, the court instructed the jury as follows:

75 *Charge to the Jury.*

The COURT: GENTLEMEN OF THE JURY, I shall be very brief in what I have to say to you about this case. As you understand, the case is based on the theory of negligence. The declaration contains two counts, one charging this defendant with negligence by reason of an unsafe construction at this point, and the other on the ground that the motorman in managing this car, did not do what a reasonably prudent man would do under all the circumstances of the case, as developed in the evidence.

Before giving you the instructions, I want to give you two or three definitions simply to get back to what we understand by the word "negligence."

"Negligence, constituting a cause of civil action, is such an omission by a responsible person to use that degree of care, diligence and skill which it is his legal duty to use for the protection of another person from injury, as in the natural and continuous sequence causes unintended damage to the latter."

Again, "Negligence is the unintentional failure to perform a duty, implied or expressly enjoined by law, whereby damage, naturally and proximately results to another."

Again, "Negligence is the failure to do what a reasonably prudent person would originally have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done."

Leaving the ordinary definitions of negligence, and coming down to the case here, it is claimed on the part of the plaintiff,
76 that this defendant was negligent because of the construction of this crossing—a place where, as the evidence indicates, people took the cars coming into the city of Washington from this suburb and at which they got off the cars in going from the city to their homes in the suburbs in this locality.

This accident occurred on the westernmost track, by the side of the westernmost rail, showing that for parties travelling on this road this was a crossing and that people going back and forth on these

cars would get off on one side or the other, depending upon whether they were going to or coming from the city of Washington.

So that, for the purposes of this case, it seems to me this must be treated as a public crossing. People had the right to be on this crossing. They must get on this crossing in going to and from the cars at this point. The cars were required to stop there on invitation and people were invited to get on the cars at that point under the testimony of this case, as I take it. So that, so far as the situation there is concerned, it seems to me it was a public place for people to go upon, for the purpose, at least, of getting on and off of these cars.

I do not think that question enters very much into this case and you, perhaps, will have no difficulty with it.

The main difficulty, it seems to me, in the case is to determine, under the situation as disclosed by this testimony, as to the
77 perilous position that children are in or liable to be in when seen upon this platform or upon this track at that point.

The construction there is said to be faulty. Of course in determining the question whether or not it is faulty, you must consider all the testimony in the case, the construction that has been used, and the reason that is given for making the construction in the way it was made; and yet if you find that it was obviously dangerous, notwithstanding that testimony, this company should not be held free from blame for adopting it. That is one question upon which you should exercise your judgment, that is upon the question whether or not there was obvious danger in a construction like this, in the width of the hole, in the depth of the hole, in view of the place where it was located and the fact that children did go on this place, which was known to the officers and employés of the defendant, and whether or not they were in the habit of crossing at that point and playing upon that track. It is for you to determine whether or not, under all of these circumstances, it was a dangerous situation and should have been observed by the defendant.

On the other question, as to whether the motorman did all that he could possibly do under the circumstances to avert this danger you will have to consider all of the testimony, not only that of the plaintiff, but of the defendant, and try to reconcile it so far as you can in order to ascertain where the fact lies. Was it prudent in that motorman, under all the circumstances of the case, to calculate that these children would be off from that track and out of
78 danger when he got there? Or was it requisite for him, as a prudent and reasonable man, to have his car under control so that he could stop very suddenly in case they were not out of danger when he got there? Of course, in determining that question, you are to consider what had been the habit of children about playing at that place. You are not to attribute any contributory negligence to the plaintiff, because this plaintiff is less than seven years of age and the law does not give him discretion. Adults have to look out for children of that kind. But at the same time he may

have been in the habit of jumping off and on that track in such a way that the motorman might have been justified in concluding there would be no danger. You are to look at all the surrounding facts and see whether that is true, whether he was justified in that calculation. There was one boy still smaller than the boy who was injured, and according to the motorman's own statement the three boys were running back and forth across the track. It is for you to determine whether or not he should have gotten into close proximity to them without getting his car under such control that he could have stopped very suddenly if necessary to prevent an accident. Of course, after he saw that the boy's foot was caught he must do everything to stop the car. But I call your attention to the time before he could see that the boy's foot was caught and ask you to consider what it would have been prudent for him to do before that time, considering all the surrounding circumstances, considering the formation of this plank crossing, of this track and of this platform, and considering the fact, as the motorman says it was a fact, that children were frequently there running back and forth. Should he have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving or before he saw that the boy's foot was caught. Of course after he saw that the boy's foot was caught it must be his duty to stop just as soon as he can in order to prevent the accident. I have no doubt he did that. But whether he discharged his whole duty towards these children, whom he admits having seen there before that time, is a question for the jury.

79

"1. The jury are instructed that if they find upon a consideration of all the evidence in the case that the plaintiff's foot was caught in the space between the planking and the rail at the crossing referred to in the evidence, so that he was unable to extricate his foot therefrom, they should render a verdict for the plaintiff, if they find that leaving the opening in the condition in which it was when the plaintiff's foot was so caught therein was not a reasonably safe method of maintaining the crossing, or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff he could have stopped the car before it reached the plaintiff."

Of course if it was a reasonably safe method of construction, and you should find that the motorman did exercise all reasonable diligence on his part, then you must find a verdict for the defendant, notwithstanding the lamentable accident and the suffering that has been caused to this plaintiff.

80

If you fail to find that that was reasonably safe construction, and if you fail to be satisfied from this evidence that the motorman did exercise reasonable diligence, you should find for the plaintiff.

"In considering the question of the liability of the defendant on either of the two foregoing grounds, the jury are instructed that they have a right to take into consideration the evidence tending to show

that the place where the accident occurred was a public crossing and that it was frequented, and that it was known to the motorman in charge of the car to be frequented, by young children, as well as by older persons.

"It is a question for the jury whether the motorman should have commenced to stop the car sooner than he did, and in determining that question they should take into consideration the fact, if they find it to be a fact, that the plaintiff and other boys were in the habit, at the point in question, of standing on the track until the car was very near them and then jumping off.

"In determining the question of how far the car was from the platform when the boys waved their hands they must be governed by the evidence, and not by speculation."

Of course you are to determine this case from the evidence and not from what counsel have said to you in their arguments, unless you find those arguments to be legitimate conclusions drawn from the evidence. You are to be governed by the evi-
81 dence and the instructions which the court gives to you as the law. Of course if counsel can aid you in reaching a conclusion which you think is correct, according to your own judgment, it is proper and right for you to consider their argument; but if they have said anything, in their arguments which does not appeal to you as being fair inferences to be drawn from the facts, you have the control of that just as you have the control of the question as to the credibility of the testimony of the witnesses and the weight to be given to each piece of testimony, the inference that is to be drawn from each fact that is admitted in the case, the size of the shoe and the shape of the shoe, the inference you may draw from that as to what the size of this hole was and how the boy's foot was fastened there—all of that is for you. What counsel have said is merely to aid you in that respect and to guide your judgment to the theory that each counsel has with reference to the merits of their side of the case. The whole question remains for you to determine as to what are the true facts, what is the true solution to be drawn from the evidence and the admitted facts, and what are the correct inferences you should draw in order to see just what this case is.

I have said I would grant the latter part of this third instruction for the defendant, and I will read it:

"And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that
82 point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

The same idea is conveyed in the instruction I have granted on behalf of the plaintiff, and the comments I made upon it. The whole matter comes down to the one point as to whether or not this defendant was guilty of negligence, or whether that construction was reasonably safe, whether that motorman acted with reasonable

diligence under all the circumstances; or whether the construction was not safe and the motorman did not act with reasonable diligence under the circumstances. You must determine those questions by the light which these people had at the time this accident occurred. From all the light they had was this an omission of duty on the part of the defendant in the construction of the road, or was it an omission of duty on the part of the motorman in failing to stop that car sooner than he did?

In addition to these instructions there is another one I have granted with reference to damages. Of course if you find for the defendant that is the end of this case, and a general verdict will be taken for the defendant. If you find for the plaintiff you must go farther and ascertain what the damages should be and fix the amount in your verdict.

"The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury, and from the loss of his leg; for the inconvenience to
83 which he has been put, and which he will be likely to be put during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

You must exercise your own best judgment in regard to that. Of course you are limited by the declaration and cannot exceed the amount claimed, $25,000. Of course that is not a suggestion to you that you should take that as a criterion to go by. That is only a limit, above which you cannot go. It is not a suggestion that you should go to that amount. The question is simply: What is proper compensation to this boy for this injury, in case you find a verdict in his favor? What is proper compensation considering all the circumstances, the wound, the suffering, his probable length of life, the handicap he will sustain by reason of this wound during the remainder of his life—make an estimate as best you can on that subject.

In addition to these instructions counsel have asked, in order that they may get upon the record some ground for your verdict in this case and in order that they may know upon what ground it is based, three questions which they desire to have submitted to you, and which you will answer yes or no as you may determine when you go to your jury room.

The first is:

84 1st. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing?

If you find that the defendant was negligent you simply answer that question yes. If you find that it was not, you answer it no.

2nd. Was the defendant guilty of negligence in the improper management of the car?

If you find that the defendant was negligent you will answer that interrogatory yes, and if you find that it was not, you will answer it no.

The third is:

"Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank?"

That question you answer yes or no, according as you may find the fact.

Of course it is admitted by counsel and they will not undertake to escape from that admission, that as soon as the motorman saw the boy's foot was caught there, he did everything to stop the car that he could do. I have no doubt the motorman did that. Of course it is claimed by counsel for the defendant that that was the extent of its liability, but, as you understand already from the instructions I have given you, you have a broader field here in which you are to exercise your judgment on this question of negligence, which you may consider in answering this second question: Was the defendant guilty of negligence in the improper management of the car.

83 If you find that it was guilty of negligence in the improper management of the car you should answer that yes. Or you may answer that first interrogatory "no" and answer the third interrogatory "Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and the plank"—you may answer that yes; and still you may bring in a verdict for the plaintiff, in the event that you find that this motorman ought to have exercised greater diligence in getting the car under control or stopping that car before the car reached a close proximity to the boy and before he saw the foot was caught in the track. If you reach that conclusion you can still answer the second interrogatory in the affirmative and maintain it on that theory, provided you find that theory to be sustained by the evidence.

It is only for the purposes of specifying that these questions are submitted to you, so that they may know something about what the ground of your verdict is.

Mr. COLE: I want to call the attention of the court to a very plain proposition which I would like to have given to this jury about which there is no controversy, but which the jury may not have in mind unless it is stated to them, and that is that the burden here is upon the plaintiff to prove negligence in one or the other of these particulars by a preponderance of the evidence.

The COURT: Yes; that burden is upon the plaintiff, and in discharging that burden the jury are to consider all the evidence, that

for the plaintiff and for the defendant, as well, in answering the question whether the plaintiff has discharged the burden of proof.

86 And thereupon the counsel for the defendant renewed his exception to the rulings of the court upon instructions refused and granted, respectively.

And be it further remembered that each of the exceptions mentioned in the foregoing bill of exceptions to the several rulings of the court mentioned were separately and severally made and taken at the time said rulings were made and before the jury retired to consider of their verdict; that the judge who presided at the trial noted said several exceptions in his minutes at the time of the taking thereof; and that now at the request of counsel for the defendant, the same are separately and severally embodied in this bill of exceptions and the same is signed and sealed in this bill of exceptions and the same is signed and sealed and made a part of the record in this case this 1st day of August, 1904, now for then.

JOB BARNARD, *Justice.*

This bill of exceptions is agreed to as a correct statement of so much of the case as is involved in the exceptions relied upon by the defendant.

A. S. WORTHINGTON,
Of Counsel for Plaintiff.
C. C. COLE,
Of Counsel for Defendant.

July 5, 1904.

87 *Directions to Clerk as to Transcript.*

Filed August 5, 1904.

In the Supreme Court of the District of Columbia.

CHARLES E. SEVERE, by His Next Friend, William B. Severe, vs. ALLEN L. McDERMOTT, Receiver of the City and Suburban Railroad Company of Washington, a Corporation.	At Law.	No. 45838.

To the clerk of said court:

Please copy the following as the record in this cause for use upon appeal to the Court of Appeals:

1. The original declaration;
2. Plea thereto;
3. Amendment to the declaration;

4. Plea thereto;
5. Bill of exceptions;
6. All orders of the court in said case;
7. Stipulation of counsel of the fifth day of May, 1904;
8. Stipulation of counsel of the 30th day of June, 1904;
9. This direction for the record.

C. C. COLE.
B. W. PARKER.

To A. S. Worthington and W. M. Lewin, Esquires, attorneys for the plaintiffs.

SIRS: You are hereby notified that we have designated the
88 above as the parts of the record in this cause to be copied for use in the Court of Appeals. If you should desire anything further not therein mentioned we will be glad to add it to our order.

C. C. COLE.
B. W. PARKER.

Received a copy of the foregoing this 1st. day of July, 1904.

A. S. WORTHINGTON,
Of Counsel for Pl'tff.

89 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } *88:*
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 88, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45838, at law, wherein Charles E. Severe, by his next friend, William B. Severe, is plaintiff, and Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of August, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1464. Allan L. McDermott, receiver, &c., appellant, *vs.* Charles E. Severe, by next friend. Court of Appeals, District of Columbia. Filed Aug. 29, 1904. Henry W. Hodges, clerk.

WEDNESDAY, *February 15th, A. D.* 1905.

ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, WILLIAM B. Severe.
No. 1464.

The argument in the above entitled cause was commenced by Mr. C. C. Cole, attorney for the appellant.

THURSDAY, *February 16th, A. D.* 1905.

ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, WILLIAM B. Severe.
No. 1464.

The argument in the above entitled cause was continued by Mr. C. C. Cole, attorney for the appellant, and by Mr. A. S. Worthington, attorney for the appellee, and was concluded by Mr. C. C. Cole, attorney for the appellant.

On motion, each side is allowed to file additional brief herein if so advised.

ALLAN L. McDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, WILLIAM B. Severe.
No. 1464.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the court:)

This is an appeal from a judgment in an action for personal injuries.

Plaintiff, then a child of seven years, lived with his father near the line of the double track electric railway, between Riverdale and Washington, operated by defendant as receiver of the City and Suburban Railway Company.

Plaintiff's father and mother had gone on a short visit to Cape May and were expected to reach home, by way of the electric railway from Washington, on Sunday, August 31, 1902, about 2 o'clock in the afternoon. Erickson Severe, the plaintiff, had two brothers, Edward and Raymond, of the age of 9 and 5 years respectively.

About 1.30 o'clock the three boys went to the customary stopping place of the cars, when passengers desired to get on or off, which was indicated by signs upon poles erected near the tracks.

There was no street or public highway crossed by the railway at the point, but, under agreement with the donor of the right of way, the defendant had constructed and maintained a board crossing on both tracks, which in the evidence was spoken of as a platform. Persons often crossed on foot to reach the fields and waters on the other side. The evidence tended to show that the boys went there to meet their parents upon their expected arrival.

The eldest boy, Edward, testified that they stayed about an hour together waiting near the track, sitting for a time near a small power house situated near the railway. That he left his brothers standing on the platform and went to the house for a drink of water, intending to return and wait for his parents. On his return Raymond met him at the gate, saying Erickson's foot was caught at the track. That he ran down and saw his brother had his foot caught between the rail and the boards of the crossing; saw a car coming down the track at the same time from 50 to 60 feet away. That he was on the boards and waved his hat and called to the motorman to stop. That the car did not stop until after it struck his brother.

Plaintiff corroborated his brother's evidence in regard to their coming to the tracks, and his brother's return to the house for water. He said that after Edward left Raymond's foot got caught between the rail and board. That he did not notice what Raymond had been doing just before this. That he went to Raymond and loosed his foot, and just as he was going back his own foot caught as he was crossing over. Witness could not pull his foot out and Raymond went to tell Edward. Raymond and Edward met at the gate and came running back. His back was to the car when he heard it coming. He turned his head and saw it coming. He waved his hand. Edward was waving his hat up and down and calling to the motorman. Raymond was behind Edward and waving also. The car was close on him when he saw it first. He saw the motorman when he tried to stop, but he was struck and dragged two or three yards. His left foot was the one caught. Other evidence showed that the plaintiff's leg was badly mangled; that he was carried in the car to Washington, and that his leg was amputated at the hospital.

A passenger on the car testified that the car stopped with a sudden jolt, and that at the time two little boys were on the bank jumping up and down and hallooing. Another passenger testified for defendant that his attention was attracted by the repeated ringing of the bell, and looking out he saw a boy on one of the tracks waving his hand. Did not see the plaintiff. The next thing that occurred was a jolt as the car was brought to a stop. The motorman was putting on the brakes as hard as he could. Could not tell how far the car went from the first time that he saw the boy mentioned.

The motorman, testifying for defendant, said that he saw the boy

on the track about 300 or 400 feet away. That three boys were on the track running and jumping backwards and forwards across the tracks. That about 150 feet away he sounded his gong. That two of the boys got back on the bank and one stayed on the track. That he rang the gong repeatedly. That he was about 35 or 40 feet away when he saw that the boy was not going to get off the track. That he applied the brakes with all his power and reversed the power, stopping the car as quickly as he could. That when he stopped and got off he found the boy about the center of the car. That he had often seen the same boy and others standing on the track, and that as the car got almost to him he would jump off, clap his hands and laugh. That he did not see either of the two boys on the bank wave their hands. Plaintiff did not wave to him, and had his face towards him when struck. That he saw his foot was hung when he was about 30 or 35 feet from him. That the car was between 36 and 38 feet in length, and was running about 8 or 9 miles per hour. Another motorman testified that he had frequently observed boys, plaintiff among them, playing on the crossing and jumping off the tracks ahead of the cars. A witness living near by testified to the same effect. There was testimony tending to show that the boards of the crossing fitted closely to the outside rail. On the inside there was a space of from 2⅜ inches to 2 11-16 inches between the edge of the board and the tip of the rail, in which the flange of the wheel ran. The rail was the ordinary T rail. The board was square-edged, and under the top of the rail the space widened. The shoe which plaintiff wore at the time was produced and the heel showed that it had been caught in this space.

Defendant introduced several witnesses, among them the contractor who laid the crossing and others familiar with such construction, whose evidence tended to show that it was customary upon railways generally to leave a space of from 2⅛ to 2½ inches for the entry and play of the flange of the wheel on the inside of each rail. One of these, a general contractor for such work, said that on steam railways the width is usually from 2¼ to 2½ inches because the wheels have a little more tread; that the space is left because if a stone should get in the space the flange would press it down, preventing derailment. That the stone ballast will work out and leave the space deeper, and that work has to be kept up in repair, and sometimes the board must be taken up to fill the low place. If not attended to the road will work out of surface. That in all the crossings on defendant's road the spaces were made from 2 inches to 2⅛ inches in width. Another of these having testified that the usual space left on railways was from 2 to 2½ inches, said that the flange of the rail level was ⅞ of an inch thick and tapered to practically nothing. He further said that in the city streets a special guard and grooved rail is laid.

Plaintiff, in rebuttal, offered evidence tending to show that at two other crossings on the defendant's line the space left between the board and the rail was much narrower than the one in question,

there being just width enough for the wheel flange and no more. Also that there was no filling of earth or gravel between the board and rail at the time, and that the board was 2 inches thick, and that subsequently the defendant had filled it in, but the filling would wash out from time to time.

The plaintiff and his elder brother denied that they had been in the habit of playing on the tracks and jumping off as claimed by defendant's witnesses. The younger boy, Raymond, was offered as a witness, but the court pronounced him incompetent after examining him for the purpose.

The jury returned a verdict for the plaintiff for $15,000. The court also required them to return answers to the following special issues:

"1. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing?

"2. Was the defendant guilty of negligence in the improper management of the car?

"3. Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank?" They answered "Yes" to the first two of these and disagreed as to the third. "Thereupon," as recited in the record, "counsel for the plaintiff consent that the jury may answer said third interrogatory in the affirmative, but said jury was discharged from further considering said interrogatory."

It is conceded, by reason of the special findings of the jury, that the defendant was guilty of negligence, not only in the construction and maintenance of the crossing, but also in the management and control of the car; that error in the instructions upon both points must be shown in order to obtain a reversal of the judgment, because either finding alone is sufficient support therefor. On the first of these issues the court charged the jury as follows:

"The construction there is said to be faulty. Of course in determining the question whether or not it is faulty, you must consider all the testimony in the case, the construction that has been used, and the reason that is given for making the construction in the way it was made; and yet if you find that it was obviously dangerous, notwithstanding that testimony, this company should not be held free from blame for adopting it. That is one question upon which you should exercise your judgment, that is upon the question whether or not there was obvious danger in a construction like this, in the width of the hole, in the depth of the hole, in view of the place where it was located and the fact that children did go on this place, which was known to the officers and employees of the defendant, and whether or not they were in the habit of crossing at that point and playing upon that track. It is for you to determine whether or not, under all of these circumstances, it was a dangerous situation and should have been observed by the defendant."

The court also gave the following extract from the instruction asked by the defendant and refused as a whole: "And the jury

should determine the question whether the construction was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

The defendant asked the following special instruction, which was refused:

"If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the defendant's officers or agents, and that a reasonably prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated."

The instructions given left the question of negligent construction and maintenance fairly to the jury upon all of the evidence relating thereto, and there was no error in refusing defendant's special instruction based entirely upon the evidence relating to the general custom of railways in respect of the space usually provided between the inner edge of the rail and the edge of the crossing board. Evidence of the general custom of other railways in the matter of construction, maintenance, and operation is not always admissible even, and though probably proper, in this case, for the consideration of the jury in the determination of the question of negligence submitted to it, it is neither conclusive nor of specially great weight. Wabash Ry. Co. *v.* McDaniels, 107 U. S. 454, 461; T. P. R. Co. *v.* Behrman, 189 U. S. 468, 470; G. T. R. Co. *v.* Richardson, 91 U. S. 454, 469; Weaver *v.* B. & O. R. Co., 3 App. D. C. 436, 448, and cases cited. See, also, Spooner *v.* D. L. & W. R. Co., 115 N. Y. 22; R. R. Co. *v.* Walter, 147 Ill. 60, 64; L. E. & W. R. Co. *v.* Mugg, 132 Ind. 168, 174; Hamilton *v.* R. R. Co., 36 Iowa, 33, 37; Koons *v.* St. L. & I. M. R. Co., 65 Mo. 592; Helfenstein *v.* Medart, 136 Mo. 595, 617; Mayhew *v.* Sullivan Mining Co., 76 Me. 100, 111; City of Champaign, 50 Ill. 61, 65.

The question as here presented is quite different from that in Asphalt Co. *v.* Mackey, 15 App. D. C. 410, 425, upon which the appellant relies. There, in an action for injury to an employee, the evidence showed that the appliance was one commonly in use and considered safe, that it was not out of repair, and that the injury was due to careless handling by a fellow servant, and it was held that it was not error to refuse an instruction permitting the jury to find that the defendant had been negligent because of its failure to

substitute for a reasonably safe appliance in general use another, and, in the opinion of the jury, a superior one.

Under an assignment of error on the refusal of the court to direct a verdict for the defendant, the contention of the appellant, on the argument, has been that the evidence of the general custom of construction of like crossings is conclusive proof of the exercise of reasonable care, but the refused instruction does not go that length.

As before said, the evidence in this regard was clearly not conclusive; nor was it of an exceptional character and weight that required the court to give it emphasis in charging the jury. It is to be remembered also that the customary space left to receive the flanges of the car wheels was proved to have been something less, even upon steam railways, than that at the place of the accident; that there was evidence tending to show that the flanges were not more than three-fourths of an inch wide at the surface of the rail, and narrowed sharply for the very short distance to their rims; that there was evidence tending to show considerably less space for the purpose at other of defendant's crossings; and that though no similar accident had been known to have occurred before on any of defendant's crossings, the foot of the plaintiff's younger brother had been caught in the same opening a few minutes before. Moreover, that no similar accident had ever before occurred within the knowledge of the defendant, a fact upon which stress is laid in the refused instruction, is of no weight in determining the question of negligent construction. Many well considered cases hold that such evidence is not even admissible. Hodges *v.* Bearse, 129 Ill. 87, 89; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 75; Bloor *v.* Town of Delafield, 69 Wis. 273, 277; Temperance Hall Assn. *v.* Giles, 33 N. J. L. 260, 263. The question of admissibility, however, it is not necessary here to decide. It may be added also that in one of the cases above cited the injury was caused by a like construction, and the question of negligence was held one proper for the determination of the jury. Spooner *v.* D. L. & W. R. Co., 115 N. Y. 22, 33.

On the second point the defendant requested the following special instruction, which was refused:

2. "If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and plank; and if they shall further find that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant."

Several other instructions of like purport were asked and refused, but as they comprehend the first point also and contain the matter relating to the construction of the crossing that has been passed upon they will be omitted.

The court thereupon charged the jury as follows:

"On the other question, as to whether the motorman did all that he could possibly do under the circumstances to avert this danger you will have to consider all of the testimony, not only that of the plaintiff, but of the defendant, and try to reconcile it so far as you can in order to ascertain where the fact lies. Was it prudent in that motorman, under all the circumstances of the case, to calculate that these children would be off from that track and out of danger when he got there? Or was it requisite for him, as a prudent and reasonable man, to have his car under control, so that he could stop very suddenly in case they were not out of danger when he got there? Of course, in determining that question you are to consider what had been the habit of children about playing at that place. You are not to attribute any contributory negligence to the plaintiff, because this plaintiff is less than seven years of age and the law does not give him discretion. Adults have to look out for children of that kind. But at the same time he may have been in the habit of jumping off and on that track in such a way that the motorman might have been justified in concluding there would be no danger. You are to look at all the surrounding facts and see whether that is true, whether he was justified in that calculation. There was one boy still smaller than the boy who was injured, and according to the motorman's own statement the three boys were running back and forth across the track. It is for you to determine whether or not he should have gotten into close proximity to them without getting his car under such control that he could have stopped very suddenly if necessary to prevent an accident. Of course, after he saw that the boy's foot was caught he must do everything to stop the car. But I call your attention to the time before he could see that the boy's foot was caught and ask you to consider what it would have been prudent for him to do before that time, considering all the surrounding circumstances, considering the formation of this plank crossing, of this track and of this platform, and considering the fact, as the motorman says it was a fact, that the children were frequently there running back and forth. Should he have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving or before he saw that the boy's foot was caught. Of course, after he saw that the boy's foot was caught it must be his duty to stop just us soon as he can in order to prevent the accident. I have no doubt he did that. But whether he discharged his whole duty towards these children, whom he admits having seen there before that time, is a question for the jury."

We are of the opinion that there was no error either in giving the one instruction or refusing the other. Under all of the facts and circumstances of the case it was proper to submit to the determination of the jury the question whether the motorman, who had ample time to do so after he first saw the children on or near the track, was not guilty of negligence in failing to get his car under such

control that he could have stopped it in time to avoid running over the plaintiff after he actually saw that his foot had been caught between the board and the rail. City Pass. R. Co. *v.* Cooney, 87 Md. 266, 288; Welsh *v.* Jackson, 81 Mo. 466; Levingston *v.* Wabash R. Co., 170 Mo. 452, 471; Holden *v.* Missouri, etc. R. Co., 77 S. W. Rep. 973 (Mo. 1903); Danville R. & E. Co. *v.* Hodnett, 101 Va. 361; Strutzel *v.* St. P. City R. R. Co., 47 Minn. 543, 545; Bray *v.* St. P. C. R. Co., 87 Minn. 280, 284; Forrestal *v.* M. E. R. & L. Co., 119 Wis. 495, 500; L. & N. R. R. Co. *v.* Van Arsdell (Ky. 1904), 77 S. W. Rep. 1103; Wallace *v.* City, etc. R. Co. (Oregon, 1894), 25 L. R. A. 663; and see Spooner *v.* D. L. & W. R. Co., 115 N. Y. 22, 33; O'Connor *v.* B. & L. R. Co., 135 Mass. 352, 356, 361.

The last question for consideration arises on an exception taken to the charge of the court instructing the jury in respect of the measure of damages, as follows:

"The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury and from the loss of his leg; for the inconvenience to which he has been put and which he will be likely to be put during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs.

"You must exercise your own best judgment in regard to that. Of course you are limited by the declaration and can not exceed the amount claimed, $25,000. Of course that is not a suggestion to you that you should take that as a criterion to go by. That is only a limit, above which you can not go. It is not a suggestion that you should go to that amount. The question is simply: What is proper compensation to this boy for this injury, in case you find a verdict in his favor? What is proper compensation considering all the circumstances, the wound, the suffering, his probable length of life, the handicap he will sustain by reason of this wound during the remainder of his life—make an estimate as best you can on that subject."

Defendant asked no special instruction on this point and pointed out no specific objection to the charge given, but excepted thereto in general terms. The following special objections have been urged on the argument: (1) That the jury were told that if they found for the plaintiff their verdict should not exceed the amount claimed in the declaration. (2) That there was no evidence from which the jury could compute the pecuniary damage of the plaintiff due to the deprivation of the use of his leg throughout life. (3) That damages for this deprivation until plaintiff shall attain the age of 21 years

accrue to his father and not to him. (4) That future mental suffering is not an element of damage.

As said before, the exception to the charge was general and not specific. And recurring to the assignment of errors we find but two of the objections now contended for pointed out therein. These are: (1) "The jury should not have been permitted to consider future mental suffering in enhancement of damages. (2) The jury should not have been permitted to consider future pecuniary loss to the plaintiff by being deprived of the use of his leg."

Under these limitations in the assignment of error the first and third objections before stated pass out of consideration. However, they are of no practical importance under the circumstances. The expression in the first part of the charge relating to mental suffering in the future was part of an instruction that was good in general, and the language is substantially similar to that of a charge on the measure of damages that has been held good by the Supreme Court of the United States under a general exception. W. & G. R. R. *v.* Harmon, 147 U. S. 571, 573, 584; see, also, D. C. *v.* Moulton, 15 App. D. C. 363, 367, 379: Whether future mental anguish forms an element of damages for the consideration of the jury, save under peculiar conditions which may or may not be found in the case before us, is a question that we need not consider in the absence of a special instruction, or specific exception directing the attention of the trial court thereto. The rule is well settled that where an objectionable element is contained in a charge that is correct in general, and is not stated as an independent proposition, a general exception to the entire charge is not sufficient. T. & P. Ry. Co. *v.* Humble, 181 U. S. 57, 67; T. & P. Ry. Co. *v.* Cody, 166 U. S. 606, 616; B. & P. R. R. *v.* Mackey, 157 U. S. 71, 91, 92, and cases cited; De Forest *v.* U. S., 11 App. D. C. 458, 464; Ryan *v.* R. R. Co., 8 App. D. C. 542, 543. This rule of practice is directly applicable to the conditions here presented. The charge given was apparently adopted from that approved in W. & G. R. Co. *v.* Harmon, *supra*, and it does not appear from the language used that the court contemplated future mental anguish as an independent element of plaintiff's damages. Had special attention been called to this language before submission to the jury the ambiguity might have been corrected.

Assuming that the second point raised in the error as assigned may be available under the general exception, we are of the opinion that it is not well taken. Damages of the kind are clearly recoverable in the case of an adult. In such a case it is within the power of the plaintiff to introduce evidence of the ordinary earning capacity of the party at the time, but still there remains a large element of uncertainty which must be left to the sound discretion of the jury. In the case of an infant of the age of the plaintiff there can be no like evidence, but it is nevertheless clear that a similar damage must occur. Rosencranz *v.* Lindell Ry. Co., 108 Mo. 9, 17; Scmitz *v.* St. L. I. M. & S. Ry. Co., 119 Mo. 256, 277; T. & P. Ry. Co. *v.* O'Donnell, 58 Tex. 27, 44. Evidence relating to the probable

earnings of the infant plaintiff after attaining an age when he might reasonably be expected to undertake regular occupation or employment would necessarily consist of conjecture on the part of the witnesses. There is no ground for the introduction of evidence in the nature of expert testimony, and the ascertainment must be left to the common experience of the jury charged with the responsibility of returning a fair verdict under all the circumstances—a verdict that is at the same time subject to the approval or disapproval of the trial court. Any other rule would deny to all infants the recovery of any damages whatever on account of the diminution of future earning capacity which must necessarily result from the loss of a limb, and would work not only hardship, but injustice also. The consequential uncertainty of the computation of such damages, as is the case in that permitted for pain and suffering, should be borne by the wrongdoer rather than by the victim of his wrongdoing.

Finding no reversible error in the proceedings on the trial, the judgment will be affirmed with costs. It is so ordered.

Affirmed.

TUESDAY, *April 4th, A. D.* 1905.

ALLAN L. MCDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, William B. Severe.
} No. 1464, April Term, 1905.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

April 4, 1905.

FRIDAY, *April 7th, A. D.* 1905.

ALLAN L. MCDERMOTT, Receiver of the City and Suburban Railway of Washington, a Corporation, Appellant,
vs.
CHARLES E. SEVERE, by His Next Friend, WILLIAM B. Severe.
} No. 1464.

On motion of Mr. J. J. Darlington, on behalf of counsel for the appellant, it is ordered by the court that a writ of error to remove

this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, appellant, and Charles E. Severe, by his next friend, William B. Severe, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of April, in the year of our Lord one thousand nine hundred and five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—
——.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Allan L. McDermott, receiver of the City and Suburban Railway of Washington, as principal, and George H. Harries, as surety, are held and firmly bound unto Charles E. Severe, in the full and just sum of three hundred and no 100 ($300.00) dollars to be paid to the said Charles E. Severe or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of April, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, plaintiff in error, and Charles E. Severe, by his next friend, William B. Severe, defendant in error a judgment was rendered against the said Allan L. McDermott, receiver of the City and Suburban Railway of Washington and the said Allan L. McDermott, receiver of the City and Suburban Railway of Washington having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said —— —— citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Allan L. McDermott, receiver of the City and Suburban Railway of Washington shall prosecute said writ of error to effect, and answer all costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALLAN L. McDERMOTT, [SEAL.]
Receiver of the City and Suburban Railway of Washington.
GEO. H. HARRIES. [SEAL.]

Sealed and delivered in the presence of—
JAS. B. LACKEY.
JAS. B. LACKEY.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

This bond is satisfactory.
A. S. WORTHINGTON,
Att'y for Def't in Error.

[Endorsed:] No. 1464 Allan L. McDermott, receiver &c. appellant *vs.* Charles E. Severe, by his next friend William B. Severe. Bond on writ of error to Supreme Court, U. S. Court of Appeals District of Columbia Filed Apr. 13, 1905 Henry W. Hodges clerk.

UNITED STATES OF AMERICA, *ss:*

To Charles E. Severe, by his next friend, William B. Severe, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein

Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 13th day of April, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.

A. S. WORTHINGTON,
Att'y for Def't in Error.

April 17, 1905.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 13, 1905. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 58, inclusive, contain a correct transcript of the record and proceedings of said Court of Appeals in the case of Allan L. McDermott, receiver of the City and Suburban Railway of Washington, a corporation, appellant, *vs.* Charles E. Severe, by his next friend, William B. Severe, No. 1464, April term, 1905, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 18th day of April, A. D. 1905.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,731. District of Columbia Court of Appeals. Term No. 631. Allan L. McDermott, receiver of the City and Suburban Railway of Washington, plaintiff in error, *vs.* Charles E. Severe, by his next friend, William B. Severe. Filed April 26th, 1905. File No. 19,731.

FILE COPY.

Supreme Court of the United States.

October Term, 1905.

Office Supreme Court U. S.
FILED
APR 19 1906
JAMES H. MCKENNEY,
Clerk.

No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEVERE, BY HIS NEXT FRIEND, WILLIAM B. SEVERE.

Brief on Behalf of the Plaintiff in Error.

CHAS. A. DOUGLAS,
GEORGE P. HOOVER,
Attorneys for Plaintiff in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES E. SEVERE, BY HIS NEXT FRIEND, WILLIAM B. SEVERE.

Brief on behalf of the Plaintiff in Error.

Statement.

This is an action for damages by appellee against appellant for a personal injury. The appellee had a verdict and judgment in the court below. He was run over by one of the cars of appellant, and his leg was so severely injured that it was amputated about half-way between the ankle and knee. The accident occurred near Riverdale, Maryland, at a plank crossing of the railroad company where the cars were accustomed to stop whenever there were any passengers to get on or off there, but not otherwise. The road consists of a double track. At the time of the accident the plaintiff was standing on the track on which cars run toward Washington, near the outer or western rail of that track, near the end of the platform nearest to Washington. The car was running towards Washington at the rate of

from eight to ten miles per hour, not intending to stop at the platform, as there were no passengers to get on or off there. As the car approached plaintiff the motorman sounded the gong. At that time there were two other boys with plaintiff and they left the track, but plaintiff did not. The evidence showed that these and other boys had been in the habit of standing on the track at that and other points in that vicinity until the car got very near them and then jumping off as the car got close to them. When the motorman came within about 35 or 40 feet of plaintiff, he saw that his foot wa scaught in the space between the outer rail and the first plank on the inside of it, the space that was left for the flange of the wheel to play in, and immediately put on the brakes and reversed the current and did all he could to stop the car, but did not succeed until it struck plaintiff and injured him as stated above.

The evidence tended to show that the space between the plank and rail where the plaintiff's foot was caught was from 2 to 2 11-16 inches wide; that the crossing was constructed in that way to leave a space for the flanges of the wheels; that it was constructed in the usual manner of constructing such crossings in the District of Columbia and elsewhere; that it was substantially in the same condition as when first constructed some years ago; that there were several other plank crossings in the District of Columbia built in a similar way, and that no accident of such a character had ever occurred in the District of Columbia or elsewhere, so far as the officers and agents of the defendant knew or had heard, either prior or subsequent to the one in question; that the crossing was constructed at the point in question pursuant to a resolution of the county commissioners of Prince George's County and an agreement between the Riverdale Park Company and the railroad company, by which the latter acquired its right of way (Rec., pp. 28-9); that a street was designated on the plat of River-

dale where the tracks of the railroad company were laid known as Maryland avenue, but that street had never been constructed or opened to public travel; that there was another street designated on said plat as street running at right angles with Maryland avenue and crossing it at the place where the plank platform was built; that that street had been opened to travel on the west of Maryland avenue, but not on the east; that there was no thoroughfare along this street across the tracks of the railroad company at this point; that carriages did not and could not cross there; that the land on the east of the railroad tracks at this point was somewhat below the road-bed, but that persons on foot occasionally crossed over and passed east towards the Baltimore & Ohio tracks, which ran east of, and parallel with, the electric car tracks; that the plank crossing or platform extends across both tracks of the electric railroad company and for some 8 or 9 feet beyond the tracks; that the planking fits up closely against the outside of each of the rails of the tracks, but the space hereinbefore described is left on the inside of each track for the flanges of the wheels to play in. It appeared from the evidence introduced on behalf of the plaintiff that he was seven years old, wanting about two months, at the time of the accident; that there were with him at the time his two brothers, one about two years older and the other about two years younger than the plaintiff; that the parents of the plaintiffs lived a short distance west of the railroad tracks; that on the 31st day of August, 1902, the day of the accident, about two o'clock in the afternoon, the three boys went to the railroad, as they testified, to meet their parents, who were away, and were expected home; that they were expected to come from the direction of Washington; that there was no car in sight coming from Washington at the time of the accident, though one could be seen when about five hundred feet away from the scene of the accident; that the parents of the plaintiff did not return until about midnight Sunday, the day of the

accident; that the plaintiff and his brothers remained near the platform playing for an hour or more, when Eddie, the oldest of the three, went back to the house to get a drink of water, leaving his brother at or near the platform; that while he was at the house getting the water the youngest of the three boys, Raymond, came up to the house and told him that the plaintiff had his foot caught in the platform and could not get it out.

Eddie testified that he went down to the crossing; that the car was coming from Riverdale; that when he first saw the car he was within 10 feet of the track; that he waved his hat and hollered for them to stop; that the car was pretty near the plaintiff when he, witness, began to wave his hat and holler; that he could not tell exactly how far it was away, but indicated by pointing to a corner of the room (this distance was measured and found to be 46 feet 6 inches). On cross-examination he was asked about the distance and again indicated by pointing to a post (this distance was measured and found to be 28 feet); that the motorman did not begin to stop the car until it got down near the plaintiff. He also testified that they were down there about an hour before he went up to the house to get a drink of water; that they were at first over by the power-house sitting down on a seat waiting, and after awhile they went over to the track, that they did not stay on the track very long; that he went on the platform with his brothers; that he left his two brothers on the platform when he went up to get a drink of water; that he intended to return and wait for his mother; that when he went down after being told that his brother was caught in the track he went within about 10 feet of the plaintiff; that he did not step on either of the tracks, but on the two boards over a little ditch before coming to the railroad; that that was as near as he went to the plaintiff while he had his foot caught in the platform; that his foot was caught in a rail on the right side as you face Washington.

Plaintiff testified that while his brother Eddie was gone up to the house to get a drink of water Raymond's foot got caught in the platform; that he did not see what Raymond was doing when he got his foot caught; that he helped Raymond get his foot out; that he afterwards got his foot caught and could not get it out; that he saw the car coming; that his back was to it; that when he heard it coming he turned his head to look to see if it was a car; that when he first saw the car it was about as far from him as to the post (indicating the same post last referred to by Eddie); that Eddie waved his hat up and down hollering to the motorman; that he could'nt see whether the motorman was stopping until he got close to him, and then he noticed him and saw him turn the brake to stop; that he never saw the car until Eddie got down there; that he saw Eddie first, and just as he was getting ready to turn around he saw the car; that he did not wave his hat any until he saw the car; that Eddie began to wave his hand just the same time he did; that when he first saw the car it was right close on him; that he was not down there on the crossing a good deal. These two witnesses were the only eye witnesses to the accident on behalf of the plaintiff.

The plaintiff introduced a witnesss, John E. Burch, who was a passenger on the car, but did not see the boy before the accident; that the car stopped with a jolt such as to make him rise up and look out of the window; that the rear end of the car was about one-half its length from the Washington end of the platform when it stopped; that when he first felt the jolt the brakes were put on; that the jolt was unusual enough to make him get up out of his seat; that the car was stopped quickly after he felt the jolt; that it was the unusual jolt that attracted his attention.

William B. Severe, the father of the plaintiff, testified that he measured the space between the rail and the plank where the boy's foot got caught, and according to his

measurement it was 2 11-16 inches from the top of the rail to the edge of the plank or board.

The defendant introduced Ernest F. Hawkins, the motorman in charge of the car, who testified that he had been a motorman ever since the line had been in operation; that he was the motorman of the car that injured the boy; that the car was running on the Washington bound track at the time; that he saw the plaintiff when he was about 300 or 400 feet away; that when he first saw the plaintiff there were three boys on the tracks running and jumping backwards and forwards on the tracks; that they were on the platform or crossing; that he sounded his gong as he approached where they were; that he was about 150 feet away when he first sounded his gong; that when he rang his gong two of the boys got back on the plank; that the other one remained standing on the track; that he rang his gong repeatedly from the time he first rang until he reached the boy, but did not know how often; when he first saw that the boy was not going to get off the track he was about 30 or 35 feet away from him; that he applied the brakes with all his power and reversed the power and stopped the car as quick as he possibly could; that when the car came to a stop it was a little south of the crossing the boy was on before the accident—a little towards Washington; that before the accident the boy was near the Washington end of the crossing; that he had often seen the plaintiff before on the track at that crossing and at Riverdale station, and along between that crossing and Riverdale; that he had seen him remain on the track after he sounded his gong while the car was approaching him; that he did not know how often the plaintiff would stand on the track until the car got almost to him and then jump off and clap his hands and laugh, but lots more than once; that he had seen the plaintiff in company with other boys do the same thing; that he does not know how often, but lots of times; that the first thing he saw or heard on the occasion of the acci-

dent that indicated that the boy might not get off the track was that he saw his foot hung; that he was then within about 30 or 35 feet from him; that all he saw was three boys running back and forth; that he did not see them waving their hands or hats or making any motion; that he did not hear any of them screaming at any time.

On cross-examination he testified that he had known the plaintiff's face for a couple of years and knew the faces of other boys around there; that he knew the two boys who were with plaintiff at that time were his brothers, because they all favored one another; that that was the only way he knew; that the boys continued to run backwards and forwards until he got within 150 feet of them; that they were playing, running, and jumping across the tracks; that the boy who remained on the track remained stationary from that time on until he was struck; that the other two boys were over on the bank; that the boy whose foot was caught did not wave to him; that he did not recognize him until after he was struck; that the boy's face was towards him before he was struck.

The defendant also introduced a witness, John Greensmith, who testified that he was on the car that injured the boy; that he was riding in the front part of the car in the second seat from the motorman, with his face towards the motorman's back; that his attention was called to the motorman by his ringing the bell repeatedly; that he looked out and saw a small boy in the center of the track, but a larger boy than the boy that was injured; that he did not see the plaintiff until after he was injured; that the boy he saw was larger than the plaintiff, and when he saw him he was standing in the center of the track, to the best of his knowledge; that he was waving his hand; that he did not think anything of it as he had often seen the same thing occur at other places; that the next thing that occurred was the motorman stopped his car; that the car just jumped—you could feel a jolt;

that he believes that the motorman was trying all he knew how to stop the car; that he was putting on the brakes with all the force he could; he thinks he stopped the car within thirty seconds or less—not over; that the wheels were slipping; that he could not say how many times the gong was rung before he looked out; that it was the repeated ringing of the gong that called his attention to it. On cross-examination he testified that when he first looked out he was 50 or possibly 35 feet from the place where the car stopped, or it might have been a little further or less; that the boy he saw standing in the middle of the track was about as far from him as to the corner of the room (indicating the same corner referred to by Eddie Severe); that there was nobody in sight that he saw except the one boy; that he could not see the boy that was injured for the reason that the motorman was there and he could not see on that side; that when he first saw the boy the motorman was ringing his gong and that was what attracted his attention; that he then saw the boy wave, and the next thing he noticed was the sudden jolt when the motorman applied the brakes, and that was what made him turn around and look, and just about a moment after he put the brakes on there was a jolt and the car raised up; that he could not say how far the car had gone from where he first noticed the boy before he felt the brakes.

The defendant also introduced as a witness A. S. Bryant, who testified that he was on the car that injured the boy, in the first or second seat from the rear, on the left-hand side, coming towards Washington; that as he approached the place where the accident occurred he got up and walked across to the opposite side and looked out of the window; that the car at that time was between 60 and 100 yards from the place where the injury occurred; that he could see the crossing as he looked out; that when he looked out he saw three boys standing on the platform on the right-hand side of the track the car was running on; that he did

not think they were near enough to the track so that the car would strike them, but they might have been; that he did not observe them all the time until the car got down there; that he just looked out and walked back to his seat; that he had not sat down until the car ran over the boy; that the car stopped very suddenly. On cross-examination the witness testified that he did not see the boys running; that when he looked out they were standing still on the little platform.

The defendant also introduced Thomas W. Phelps, who testified that he had been for about four years a motorman on the City and Suburban line; that he had been running there continuously ever since the road started and was familiar with the place along where the accident happened; that he did not know the Severe boys, but recognized the plaintiff; that he could not remember whether prior to the accident he had seen the plaintiff standing upon the track; that he had frequently seen boys playing along the track; that they would jump out and run across ahead of the cars; that he had seen them stopping and standing on the platform and stopping the cars as they would go along, and then run away laughing when the motorman had stopped; that he had observed this at this particular place and at all the stations along there, and it was a frequent occurrence.

The defendant also introduced as a witness Harry T. Knight, who testified that he had resided at Riverdale for six and a half years; that his house was in the same block with Mr. Severe's—about 250 feet away; that he knew the Severe boys prior to this accident and had occasionally seen the three young Severe boys playing, jumping, and standing on the railroad tracks down near where the platform is and where the accident happened; that he could not tell exactly what they were doing, but he had seen them with his own boys running around the platform and off and on; that he could not say that he had ever seen the boy who was injured standing on the track and jumping off as the car

approached; that he had seen the Severe boys with his own boys and other boys prior to the accident standing on the track at that point as the car approached and jumping off as it did approach; that he could not say how many times he had seen that done before the accident, but it was quite often during the summer. On cross-examination he testified that it occurred right often when the boys would stop in front of a car and when it would come up would jump off just before it got there; when the boys were doing this he was in his garden; that the corner post of his garden was within 30 feet of the railroad track; that when the boys were on the track the motorman would not do anything except ring his bell and the boys would jump off.

The defendant introduced as a witness James B. Lackey, secretary of the City and Suburban Railway Company, who testified that on the day of the accident and after it he measured the space in which the boy's foot was caught and it was scant $2\frac{1}{8}$ inches. (The shoe the boy wore at the time of the accident was produced in court by the plaintiff and this witness testified that he measured the width of it and it measured scant 2 inches at the widest point); the witness also testified that this crossing is constructed in the usual way of constructing crossings of that sort outside of the city limits; that there are a number of them in the District constructed in the same way, and that he never knew or heard of an accident like the one which happened to this boy, either before it happened or afterwards.

The defendant also introduced Fred J. Mersheimer, who testified that he is the special agent of the Claims Department of the railroad company; that he observed Mr. Lackey measure the space and it measured $2\frac{1}{8}$ inches; that he had been connected with street railways since 1883 as adjuster of claims with this company and other companies in the District of Columbia and in New Jersey; that the plank crossing in question was practically the same as all other plank crossings; that in his experience he had never known

or heard of an accident happening in the way the plaintiff was injured, either before or since the accident.

The plaintiff introduced one W. H. H. Allen, who testified that he had resided in Washington seventeen years; that he had been a railroad contractor for twenty-six years; that he had done general construction of railroads; that his firm of Talty & Allen constructed the City and Suburban road and built the crossing in question; that it corresponded with the general and usual way of constructing planking crossings across electric railways. That it was the standard way of putting in crossings; that the distance between the inside of the rail and the planking according to standard construction on street railways is about 2⅛ inches; that on steam railways it is about 2¼ or 2½, because the wheels have a little more tread; that the space is left for the purpose of guarding against the danger of derailment; that in his experience he had supervised the construction of a great many crossings; that he had been on construction work for forty-odd years.

The defendant also introduced as a witness Harry W. Fuller, who testified that he was general manager of the Washington Railway and Electric Company, and had been since February, 1901; that he was in Jersey City with the North Jersey roads for seven years; that he had been in the street railway business since September, 1891; that he had a broad general knowledge of what is considered good practice in railroad construction; that in constructing plank crossings across street railroads the space left between the planking and the inside of the rail for flange space is from 2 to 2½ inches; that as far as his knowledge and observation went that the usual thickness of the flange that runs in the groove is 15-16 of an inch. On cross-examination he said that the flange tapered toward the outer rim; that he gave the thickness of the heaviest part of the flange; that the flange at a level with the surface of the rail was ¾ of an inch and tapered to practically nothing.

The defendant also introduced as a witness George W. De Rene, who testified that he had been roadmaster on the Washington Railway and Electric Company for five years. That he had supervision of the road department, road beds, and overhead construction and everything pertaining to that department; that he was familiar with the usual construction of plank crossings over suburban roads; that he had had twenty years' experience in constructing railroads; that he was familiar with the plank crossing where the accident happened; that the crossing was the regular standard crossing that is put in all over the country on electric roads, that there is a universal standard of space left between the inner side of the rail and the planking; that it was between 2 and 2¼ inches; that the trackman's gauge of a crossing is the width of three fingers past the first joint; that this is the universal gauge throughout the United States.

The plaintiff offered no evidence in rebuttal upon the subject of the proper construction of the crossing, but Mr. Lewin testified that two or three days after the accident he looked at the crossing where the accident happened and at two crossings in Hyattsville; that at the two last named the space between the rail and the plank was simply of the necessary depth for the flange; that he did not know whether those were plank crossings, and did not know what was under the earth fillings, but just inside the rails there was a board; that at the place where the accident happened it was entirely different—just the raw edge of the board. But it appeared that the two crossings in Hyattsville are crossed by carriages, which would account for the gravel filling in the space. And the defendant proved by Mr. Mersheimer that it was customary to have men go along constantly and clean these places out where they were filled up with earth.

The plaintiff was recalled in rebuttal and testified that he had not been in the habit of going on the track before he was hurt and standing there when the cars were coming;

that he never stood there when the car was coming until it got near him and then jump off; that he never saw any of his brothers do that, but that he saw a boy named Richard Garrison stand there until the car got right close to him, and then he would jump off; that that was before he was hurt; that he saw him hopping the cars there lots of times.

Upon this state of the evidence the defendant's counsel prayed the court to instruct the jury to return a verdict for the defendant, but the court denied the prayer and the defendant's counsel excepted (Rec. p. 38).

Thereupon the plaintiff's counsel requested the court to give the jury two instructions, as follows:

> "1. The jury are instructed that if they find upon consideration of all the evidence in the case that the plaintiff's foot was caught in the space between the planking and the rail at the crossing referred to in the evidence, so that he was unable to extricate his foot therefrom, they should render a verdict for the plaintiff if they find that leaving the opening in the condition in which it was when the plaintiff's foot was so caught therein was not a reasonably safe method of maintaining the crossing, or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff he could have stopped the car before it reached the plaintiff.
>
> "In considering the question of the liability of the defendant on either of the two foregoing grounds the jury are instructed that they have a right to take into consideration the evidence tending to show that the place where the accident occurred was a public crossing and that it was frequented, and was known to the motorman in charge of the car to be frequented, by young children as well as by older persons.
>
> "2. The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the

pain resulting from the injury, and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct cause of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs" (Rec. p. 38).

The defendant's counsel objected separately to the giving of said instructions, and each of them, but the court overruled said objections and gave said instructions to the jury, and the defendant's counsel excepted separately to each ruling (Rec. pp. 38–9). Thereupon the defendant's counsel moved the court to grant five several instructions to the jury, separately, as follows:

"2. If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and plank; and if they shall further find that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant.

"3. If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere

to the knowledge of the defendant's officers or agents, and that a reasonably prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated.

"4. If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had ample time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and the plank, and that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff; and if the jury shall further find from the evidence that the crossing or platform at the place where the accident happened was constructed in the ordinary and usual way of constructing such crossing in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the officers or agents of the defendant, and that a reasonably prudent man would not have anticipated such an accident from such construction, then the verdict should be for the defendant. And the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident and not afterwards. And the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated.

"5. If the jury shall find from the evidence that the crossing or platform at the place where the accident happened was constructed in the usual and

ordinary way of constructing such crossings in the District of Columbia and elsewhere, and that such construction had been in use in that and other places for some years prior to this accident, and that no accident of the kind in question had occurred prior to that time in the District of Columbia or elsewhere to the knowledge of the defendant's officers or agents, and that a reasonably prudent man would not have anticipated such an accident from such construction, then they should not find the defendant guilty of negligent construction, and the jury should determine the question whether the construction in question was negligent in the light of the facts prior to the accident, and not afterwards, and the question upon that point is not whether such an accident was possible, but whether it was reasonably to be anticipated.

"6. If the jury find from the evidence that the motorman sounded the gong when he was far enough away from the plaintiff and his associates, so that they had sufficient time to leave the track before the car reached them; and if they shall further find that as soon as the motorman saw that the plaintiff probably would not or could not leave the track before the car reached him, he did all in his power to stop the car before it struck the plaintiff, and shall further find that the construction was not negligent, then they should find for the defendant; and in determining whether the motorman should have commenced to stop the car before he did they may consider the fact, if they find it to be a fact from the evidence, that plaintiff and others were in the habit of standing on the track and leaving it as the car approached near them, and whether he saw any waving from any one before he commenced to stop the car."

But the court denied each of said motions separately, and the counsel for defendant excepted separately to each of said rulings (Rec. pp. 39, 40, and 41).

Assignment of Errors.

The court erred:

1st. In refusing to direct a verdict for the defendant.

2d. In granting the instruction for the plaintiff numbered one.

3d. In granting the instruction for the plaintiff numbered two.

4th. In refusing to grant the instruction asked for defendant numbered two.

5th. In refusing to grant the instruction asked for defendant numbered three.

6th. In refusing to grant the instruction asked for defendant numbered four.

7th. In refusing to grant the instruction asked for defendant numbered five.

8th. In refusing to grant the instruction asked for defendant numbered six.

The foregoing assignments of error give rise to the following points:

(*a*) There was not sufficient evidence to justify the submission of the question of negligent construction to the jury.

(*b*) If the question of negligent construction was proper for the consideration of the jury under the evidence, they should have been instructed that ordinary and usual construction is not negligent construction, if a reasonably prudent man would have adopted it.

(*c*) There was not sufficient evidence to justify the submission of the question of the alleged negligence of the motorman to the jury.

(*d*) If the question of the alleged negligence of the motorman was proper for the consideration of the jury under the

evidence, they should have been instructed that if he sounded his gong when far enough away from the plaintiff to enable him to leave the track in safety, he had the right to assume that he would do so, and that it was not his duty to commence to stop the car until he discovered something to indicate, to a reasonably prudent man, that he probably would not or could not do so, and that if after making such discovery he did all in his power to stop the car, he was not guilty of negligence.

(*e*) The jury should not have been permitted to consider future mental suffering in enhancement of damages.

(*f*) The jury should not have been permitted to consider future pecuniary loss to the plaintiff by being deprived of his leg.

A and B.

These two points present the question of THE DUTY OF THE DEFENDANT AS TO CONSTRUCTION.

The evidence introduced in behalf of defendant showed that the construction in question was the ordinary and usual construction in such cases in this District and elsewhere, and had been in use for years, and that no accident had been known to the officers, agents, or employees of the defendant to have occurred therefrom, except the one mentioned in this case. A reasonably prudent man would not have anticipated an accident from such construction.

THE DUTY OF THE DEFENDANT WAS PROPERLY DISCHARGED BY THE ADOPTION OF USUAL AND ORDINARY CONSTRUCTION WHERE, AS IN THIS CASE, THERE WAS NOTHING TO SUGGEST DANGER.

This is the general rule in all cases, except possibly where the relation of passenger and carrier exists between the plaintiff and defendant. It has been applied by this court as between employer and employee, and certainly the defendant in this case owed the plaintiff no greater duty than an employer owes its employees to furnish a safe

place, implements, and machinery. The following cases support this rule, and in some of the cases the relation of passenger and carrier existed between the parties.

Asphalt Co. *vs.* Mackey, 15 D. C. App. 410.
Wabash, etc., R. R. Co. *vs.* Locke, 112 Ind. 404.
Dougan *vs.* Champlain Trans. Co., 56 N. Y. 1.
Crocheron *vs.* U. S., etc., Ferry Co., 56 N. Y. 656.
Cleveland *vs.* N. J. Steamboat Co., 68 N. Y. 306.
Loftus *vs.* Union Ferry Co., 84 N. Y. 455.
Burke *vs.* Witherbee, 98 N. Y. 562.
Laflin *vs.* B. & O. R. R. Co., 106 N. Y. 136.
Fahner *vs.* Brooklyn Heights R. R. Co., 83 N. Y. Supp. 815.
C. B. & Q. R. R. Co. *vs.* Stumps, 55 Ill. 367.
Nitro Glycerine Case, 15 Wall, 524.
Charnock *vs.* Tex. & Pac. Ry. Co., 194 U. S. 433.
Morrissey *vs.* Eastern R. R. Co., 126 Mass. 377.
B. & O. R. R. Co. *vs.* Schwindling, 101 Pa. St. 258.

In the case of Asphalt Company *vs.* Mackey, 15th D. C. App. Cas. 410, the action was by the administrator of a man who was killed while in the employ of the asphalt company, unloading broken stone from a scow, by being struck by the iron handle of a bucket which was used in unloading the stone, and it was alleged in one count of the declaration that it fell on account of improper construction.

In the statement of the case by Chief Justice Alvey, on page 415 of the report, it is said:

> "The declaration contains two counts; the first alleging that the defendant used in and about its work, wherein the said Martin was employed as a laborer, a certain piece of machinery and appliances attached thereto, in bad and insufficient repair, whereby death was caused; and the second count alleging that said machine and appliances used therewith was of insufficient construction for the purpose intended, and that other and better contrivances

could have been adopted and used by the defendant for the purpose aforesaid; but the defendant negligently omitted the use of such other appliances."

On page 420 of the report, the chief justice recites the testimony of a witness who was a machinist and who was called to prove that the handle of the bucket was improperly constructed, and he so testified, and pointed out wherein a safer construction might have been adopted, but he also testified that—

> "*The buckets of that type have been in use a number of years to his knowledge, but he did not know how many years, or when they were invented, but it must have been a good many years that they have been in use.*"
>
> See report, p. 421.

The case was submitted by the court below to the jury upon both counts of the declaration; and while this court held that it was not error to submit the case upon the first count, it held that it was error to submit it upon the second count. In the opinion, the chief justice uses this language:

> "But while there was some evidence to be submitted to the jury on the first count of the declaration, there was absolutely no legal or competent evidence tending to support the allegations of the second count that the latch or contrivance for holding the handle of the tub or bucket in its upright position, for the purposes for which said bucket was used, and that a better contrivance could have been adopted and used by the defendant for the purpose aforesaid, but which the defendant neglected to adopt and use" (see report, p. 422).

Referring to the same subject later in the opinion, the chief justice said:

> "But with respect to the second count of the declaration, as there was no proof legally competent to

entitle the plaintiff to recover under that count, the prayer of the defendant that the jury be instructed that on the second count of the plaintiff's declaration he was not entitled to recover, and on that count the verdict should be for the defendant, on the ground that no cause of action was shown by said count, and that the evidence was insufficient to sustain a verdict for the plaintiff on said count, should have been granted" (see report, p. 423).

On page 424 of the report the chief justice quotes a paragraph from the charge of the court below, which was held to be error. The quotation is as follows:

> "That it is the duty of the defendant in furnishing this machinery to employees to furnish them with machinery that was so constructed and planned as would make it reasonably safe to be used and handled by the employees, and it should have been such machinery and so regulated and planned as persons exercising ordinary care and prudence would plan and regulate in furnishing such machinery for the use of their employees. About that the jury has heard the testimony. They have seen the model produced here and have heard the testimony and explanations of the witnesses. They have heard the testimony in regard to how the accident occurred, what position the parties were in at the time, and it is for the jury to say from the evidence, taking the evidence and giving it careful consideration, what relation, if any, the lack of the proper construction of this machinery had with the occurrence of this accident" (see report, p. 424).

Commenting upon this instruction, the court said:

> "By the instruction given, the jury were allowed to speculate and determine at will what plan and construction of machinery should have been employed by the defendant in the execution of its work, with a view to the safety of its employees. The question submitted to the jury by this instruction was not whether the latch appliance affixed for keeping

the handle of the bucket in position was in good or bad repair, or if in bad repair whether it was safe to those employed in operating it. It was permissible to the jury, under this instruction, to conclude, and they may have so determined, that the latch or trigger for supporting the handle of the bucket was of improper construction, and that some better contrivance could and ought to have been used. It is not pretended, however, that the bucket and its appliance, and mode of operation, constituted any novel and untried piece of machinery, in the operation of which there was any apparent ground for the apprehension of danger. *On the contrary, it is shown by the proof that this bucket, with the particular appliance for operation, has been in use, not only by the defendant, but by others, for several years, and that it has been regarded as entirely safe.* It is true, when the conduct of a party as an employer, using machinery in his work, amounts to negligence to the damage of his employees, in failing to keep his machinery or appliances in safe repair and operative condition, the law holds him responsible; *but his responsibility can not be made to depend upon the varying notions or opinions of juries as to what kind of structure of machinery he should use in his work.* Such a principle, if sustained, would tend to embarrass all the industries of the country that are carried on by machinery, the most of which is attended with more or less danger to those operating the machinery" (see report, pp. 424–5).

The last pargraph of the opinion contains a quotation from a Pennsylvania case, in the following language:

> "They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances *is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man.* The test of negligence in employers is the same, and however strongly they may be convinced that there is a better

> or less dangerous way, *no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they can not be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community*" (see report, p. 426).

It will be observed that the two first sentences in this last quotation are a general statement of the principle as applied to all persons, and the residue of the quotation applies that principle to employees. The italics in the above quotations are ours. It is submitted that this case shows that the court below should have informed the jury that there was no sufficient evidence of negligent construction. There was in the Asphalt Co. case evidence introduced by the plaintiff tending to show that there was a safer way of constructing the handle, but the court held that it should not have been submitted to the jury, because there was no conflict in the evidence upon the point that it was *usual* construction. In our case there was no evidence tending to show a better or safer method of construction, while the evidence was conclusive that the construction complained of was the ordinary and customary one.

In the case of the Wabash, St. L. & Pac. Ry. Co. *vs.* Locke, Admr., 112 Ind. 404, the injury was caused by the sagging of a wire which caught a brakeman of defendant and was consequently broken. In falling it twined around plaintiff's intestate, who was on the right of way by permission of defendant unloading a car, and dragged him, thereby inflicting injuries from which he died. Copious extracts are made from the opinion in this case, because it seems to have been thoroughly considered, and many cases are cited in support of its conclusions.

In reversing judgment for plaintiff, the court said:

> "Where, however, an action is predicated upon an injury resulting from an act or omission which

could only become tortious on account of the relations which the parties sustained to each other, and where the very substance of the wrong complained of itself was the failure to act with due care and foresight, then the right of action depends primarily upon so fixing the relation of the parties as to show the defendant's obligation, and upon showing further that the harm and injury complained of was such as a reasonable man in the defendant's place should have foreseen and provided against.

"In such a case it is not enough to show that an accident happened, and that death or injury resulted therefrom. Negligence is not to be presumed *from the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional, and extraordinary character.* . . . The obligation of the railway company did not, however, require it to make the place absolutely safe. It was not required to make accidents impossible. Its duty was not to allow its depot and grounds, to and upon which people were invited to come, to become more dangerous than such a place would reasonably be, having regard for the necessities of its business and the nature of the contrivances necessarily employed in carrying it on.

"The case, therefore, stands upon a different footing from the cases which involve the duties of carriers who contract to carry passengers safely to a particular destination. In such cases proof of an injury ordinarily establishes a prima facie case of negligence in favor of a passenger which the carrier must overcome (citing authorities).

"Where, as in the case under consideration, the obligation is not in its nature so nearly absolute, and the circumstances of the accident suggest, at first blush, that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence assumes the burden of proving that the defendant has, by some act or omission, violated a duty incumbent on it, from which the injury followed in natural sequence (citing authorities).

"Taking the admitted or established facts, and those most favorable to the plaintiff, and the inquiry

in the present case must be, does it appear, or can it be inferred, that the railroad company failed to observe such precaution for the safety of the plaintiff's decedent, and others similarly situate, as ordinarily regulates the conduct of reasonable men? Or can it be inferred from the evidence that reasonable men engaged in like business would have anticipated and provided against the accident which happened? If no such inference could properly have been drawn, then there was no wrong; the company was not negligent, and there is no liability. . . .

"Mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, can not be taken into account as a basis upon which to predicate a wrong. 'Now a reasonable man,' says a recent learned author, 'can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. *The reasonable man then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precautions by the measure of what appears likely in the known course of things* (citing authorities).

"The proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence, but whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence (citing cases).

"The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means which it may appear after the accident would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident (citing cases).

"In Sjogren *vs.* Hall, 53 Mich. 274, the plaintiff, by some accident not explained, lost his leg by being

caught in a wheel connected with the operation of a sawmill in which he was employed. The plaintiff claimed that the defendant was negligent in leaving the wheel uncovered, and that at a very small expense the accident could have been prevented. Cooley, J., delivering the opinion of the court, said: 'If the accident which occurred was one at all likely to happen—if it was a probable consequence of a person working about the wheel that he would be caught in it as plaintiff was—there would be ground for pressing this argument. But the accident can not be said to be one which even a prudent man would have been likely to anticipate. . . . So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injuries impossible' (citing cases).

. . . . . .

"Crafter *vs.* Metropolitan R. W. Co., L. R., 1 C. P. 300, was a suit to recover for injury occasioned by the plaintiff falling on a stairway, which the defendant's duty required it to keep in a safe condition. The cause of the slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that in his opinion the staircase was unsafe on account of the smooth condition of the nosing and the absence of a handrail. There was nothing to contradict this, except that great numbers of persons had passed over the stairs, and that no accident had ever happened before. Setting aside a verdict for the plaintiff, the court held there was no evidence of negligence (citing authorities).

"These cases, to a greater or less extent at least, go upon the theory that persons who are charged with a duty in relation to a particular matter or thing have a right to rely upon the sufficiency of a structure or contrivance, *such as is in common use for the purpose*, and which has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose. When a structure or

appliance, such as is in general use, has uniformly answered the purpose for which it was designed and used, under every condition supposed to be possible in the business, it can not in reason be said that a person has not acted with ordinary prudence and sagacity in not anticipating an accident which afterwards happens in the use of the thing, notwithstanding it continued substantially in the same condition all the time."

In the case of Dougan *vs.* Champlain Transportation Co., 56 N. Y. 1, the plaintiff's intestate, a passenger, slipped under the gangway rail of a steamboat, fell overboard and was drowned; and it appeared that all the boats upon Lake Champlain were constructed in the same manner; that they had been so run for many years, and there was no proof tending to show that anyone had ever before gone overboard in that way. It was held that the plaintiff was properly non-suited. Grover, J., writing the opinion, said:

"It will be seen that the only proof of negligence was the omission to enclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury. But the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years, and there was no proof tending to show that anyone had ever before fallen and gone overboard under the railing, or that any such danger had been apprehended by anyone. It is obvious that no such thing was likely to occur."

In Crocheron *vs.* North Shore Staten Island Ferry Co., 56 N. Y. 656, the case was as follows:

"Plaintiff was a passenger upon one of defendant's boats. Upon each step of the main stairway of the boat was put a brass plate or covering, which was

corrugated, save where it turned over the edge of the step. This was left smooth and slippery. Plaintiff's evidence tended to show that she slipped on the edge of the step, as she was passing down the stairway to leave the boat, and was injured. The placing of this plate upon the stair was the alleged negligence. The stairs were finished in the same manner as upon the best river boats and upon American sea-going steamers. The boat had been in use a year and had carried, on an average, a thousand passengers a day. No injury of the kind had before occurred. Several experienced men testified that this mode of covering stairs was the best in use. Held, that the evidence failed to show negligence, and that a refusal to non-suit plaintiff was error."

There was no opinion except as above.

In the case of Cleveland *vs.* N. J. Steamboat Co., 68 N. Y. 306, the plaintiff went on board of defendant's steamboat to take passage to Albany. Defendant had provided a gate to close the gangway opening, the top bar of which projected at each end. The projecting ends of this bar, when the gate was in its place, rested in iron staples at each end of the opening to prevent the gate from swinging, and there were two upright stanchions placed outside the gate let into the deck. There was also a top rail which received the stanchions and which, when in place, was secured by iron slides. The gate had been put in place before the boat left the wharf. As the boat moved out persons on board attempted to jump ashore, but fell into the water. This caused a sudden rush of a crowd of passengers to the side. Plaintiff was pushed against the gate. The gate gave way under the pressure and plaintiff fell overboard. The court, in reversing a judgment for the plaintiff, said:

"The more important question is whether the defendant is chargeable with negligence causing the mishap to the plaintiff.

"The plaintiff went onto the boat for the purpose of taking passage on that trip, and though he had

not yet procured a ticket, he was, if he remained on board, liable for the payment of the passage money. He was there in the character and relation of a passenger. The defendant owed him the duty of a carrier of passengers to a person in its charge as such. That duty is, to use the strictest diligence to protect the life and person. By this rule the defendant is liable for any injury which might reasonably be anticipated to occur, in view of all the circumstances, and of the nature of the carriage and the number and character of the persons upon the boat (citing authorities). This broad statement has limits. A carrier of passengers is not bound to foresee and provide against casualties never before known and not reasonably to be expected (citing authorities). Hence his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it. . . .

"If it be conceded that the occurrence of just the same thing again would be an act of negligence, it is still to be ascertained whether it was one which on that or any other evening was then reasonably to be anticipated, and which defendant ought to have expected as liable to take place in the natural course of things."

As tending to show that such an accident was not reasonably to be anticipated, the court at page 313 of the report lays stress upon the fact that none had happened before, in the following language:

> "*It had not been known so to occur before, and we do not think it can be said that it was reasonably and naturally to be looked for as liable to take place then. The case is without a syllable of proof that such an accident ever happened before, or that any one of the constituents of it ever happened before. . . . We see no facts in proof, from which it can be said that such an occurrence was reasonably to be anticipated, or that it was or should have been contemplated by the defendant as in the nature of things likely to occur.*"

In Loftus *vs.* Union Ferry Co., 84 N. Y. 455, the plaintiff's

intestate, a child 6 years old, while leaving one of the defendant's boats, fell through one of the openings in the guard rails into the water and was drowned. The plaintiff recovered, and it was held that the verdict was properly set aside. Andrews, J., writing the opinion of the court, said:

> "The law does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty in the use of appliances provided for it. *It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble.* If the defendant ought to have foreseen that such an accident might happen, or that such an accident could have reasonably been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. *The company had the experience of years certifying to the sufficiency of the guard.* That it was possible for a child, even a man, to get through the opening was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty."

In the case of Burke *vs.* Witherbee et al., 98 N. Y. 562, defendants owned and worked an iron mine. The ore was taken out of the mine upon cars drawn upon a track by a cable, to which the car was attached by a hook. Two cars were used, one of which was loaded while the other was being drawn out, and on return of the empty car the hook was shifted to the loaded ones. As an empty car was descending, the hook in some way became detached and plaintiff's intestate was struck and killed by the car. In an action to recover damages it appeared that in other mines as well as in this where two cars were thus operated the hook was always used on account of the facility with which it could be changed from one car to another. It had been used in

this mine over a year, night and day, without the happening of any previous accident of the kind. Held, that the evidence did not justify an inference of negligence on the part of the defendants, and that a refusal to non-suit was error.

There were a verdict and judgment for the plaintiff below.

In delivering the opinion, holding that the case should not have been submitted to the jury, the court said:

> "It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine owner for using an implement which had been employed in different mines and which under varying conditions upon countless occasions uniformly answered its purpose without injury to any one (Titus *vs.* Union Ferry Co., 84 N. Y. 455).
>
> "It is a mistake for one to take his stand after an accident and to impute responsibility from a view thus obtained. It is nearly always easy after an accident has happened to see how it could have been avoided. But taking our stand before this accident, the very first of the kind, so far as we know, that ever occurred, we can, upon the facts of this case, see no ground for imputing against the defendants the want of that ordinary care, diligence and foresight which they, as employers, owed to the men in their service."

In the case of Laflin *vs.* B. & S. R. R. Co., 106 N. Y. 136, the action was brought to recover damages for injuries sustained by the plaintiff in alighting from one of the defendant's cars, and the circumstances of the accident were that the train in which she was a passenger reached the station at Dayton, at 8 o'clock in the evening, and she left the car for the purpose of changing to another train at that place, and in her effort to step from the car to the station platform, she fell between it and the car, and sustained the injuries of which she complains. She alleged that the space between the platform and the car was too great, and that in

consequence thereof, when she stepped off the car, she failed to reach the platform and was thus caused to fall.

Amongst other things the court, in its opinion, said:

> "There was no proof that the platform was not constructed in the ordinary way, nor that the space between it and the car was any greater than the exigencies of the business and the operations of the railroad required. There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary, the evidence shows that the platform had been used for many years by men, women and children, and that no one but the plaintiff had ever been injured or had suffered any inconvenience on account of the distance of the platform from the cars. Thousands of men, women, and children must have passed from the cars to this platform in entire safety. Under such circumstances how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? It was not bound to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted. *In the case of a platform which had always been safe, and answered its purpose for men, women, and children, in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient?*"

After citing and quoting from some of the cases referred to in this brief, the court said:

> "The application of these authorities to his case is quite obvious. No structure is ever so made that it may not be made safer. But as a general rule, when an appliance or machine or structure, not obviously dangerous, has been in daily use for years,

> and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness."

There were a verdict and judgment for plaintiff below, which were reversed and a new trial ordered.

Fahner *vs.* Brooklyn Heights Co., 83 N. Y. Supp. 815:

Plaintiff, in passing out of the station of defendant's elevated railroad to take his car, was obliged to pass through a doorway in which defendant maintained two swinging doors. A passenger preceded him, and permitted one of the doors to fly back in his face. To avoid injury he threw up his arm, which passed through the glass panel on the door, cutting him seriously.

The court said:

> "It thus appears from the undisputed evidence in this case that the defendant has used glass in its doors of the same kind that was in the door where the plaintiff was hurt for a series of years, and that this use was general over its system where glass of the same size was used, and that the witness, who was in a position to know of these accidents, because he was called upon to make the repairs, in a period of eight years had never heard of any person or passengers being injured by the breaking of one of these glasses. He had known of their being broken by the action of the wind, and this appears to have been the only thing which their experience had warranted them in guarding against. This, it seems to us, brings the case within the rule so often asserted, that a carrier of passengers is not bound to foresee and provide against casualties never before known and not reasonably to be expected, and that his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it; and it has been held that this rule is not confined to common carriers, but is applicable generally to negligence cases. Dwyer *vs.* Hills Bros. Co., 79 App. Div. 45, 46, 79 N. Y. Supp. 785, and

authorities there cited. As a general rule, when an appliance or machine or structure not obviously dangerous has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness. Laflin *vs.* Buffalo S. W. R. Co., 106 N. Y. 136, 141, 12 N. E. 599, 60 Am. Rep. 433. In the absence of any evidence that any one had ever been injured by the use of double-thick window glass under the circumstances disclosed by the evidence, and where the evidence is undisputed that similar glass had been used in the door where the injury occurred for two years, and upon the defendant's railroad system generally for a number of years, and that for a period of eight years one in a position to hear of such an accident, if it had occurred, had never learned of such a case, it would seem that it was error to permit the jury to speculate upon the question of the defendant's negligence. The case is well within the rule that where an accident is not the reasonable, natural, and probable result of the situation, which ought to have been foreseen by the defendant in the exercise of the degree of care exacted from a carrier of passengers, no liability follows. Ayers *vs.* Rochester Railway Co., 156 N. Y. 104, 108, 50 N. E. 960, and authorities there cited."

In the case of C. B. & Q. R. R. Co. *vs.* Stumps, 55 Ill. 367 it was said by the court:

"When an accident has once occurred, because it is seen after the event that the use of a particular precaution would have effectually prevented it, that does not show that it was the duty of the appellants beforehand, to have adopted that precaution. Their duty was to have used every reasonable precaution and not every absolute necessary precaution to avoid injury to individuals.

"The question is rather, what would have been the course of a very prudent person prior to the accident; whether he would have thought exposure to injury from such cause such a probable source of danger

> as to have required the adoption of any further precautions and safeguards than those used to protect against it (citing cases)."

In the Nitro-Glycerine case, 15 Wall. 524, where there was injury to the property of the plaintiff, by the explosion of a box of nitro-glycerine, while in the custody of a common carrier, for transportation, and it was claimed that the defendant was guilty of negligence in handling it, while the box was in a leaky condition, which, it was contended, was sufficient to put the defendant upon notice of its dangerous condition, the Supreme Court, at pages 536–7, said:

> "'Negligence' has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. *It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.*"

In the case of Charnock *vs.* Tex. & Pac. Ry. Co., 194 U. S. 433, the Supreme Court recognized and applied the doctrine we are contending for. That was a suit against the railroad company to recover the value of property destroyed by fire through the alleged negligence of the railroad company. The property destroyed was cotton, which was loaded by the owners upon cars furnished by the company on a switch at Meekers, which was not a regular station on the road, but the company had been accustomed to furnishing cars on the switch at the request of the shippers, and after

they were loaded moving the cars out by the first freight train passing after the loading was completed. The cotton in question was loaded in the afternoon and the first train that would pass thereafter was 9 o'clock the next morning. During the night the cotton aboard the cars was destroyed by fire. There was no agent maintained at the station. The allegation of negligence was that the cotton was left by the company in the cars standing upon the track in the open country unguarded and unwatched in any particular whatever. That it was the duty of the company to protect the cars and cotton from depredation, loss, or injury by third persons or wrong-doers. The Supreme Court, in sustaining the action of the trial court in directing a verdict for the defendant, said :

> "Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. Applying that test in the case at bar we do not think negligence on the part of the defendant was established."

Where the plaintiff is in a railway station or upon a platform for pleasure or curiosity and is injured by a defect therein, there can be no recovery. Under such circumstances the railroad company owes the party no duty of diligence, but only the negative duty not to intentionally injure.

Redigan *vs.* Boston & Maine R. R., 155 Mass. 44.

The plaintiff was injured by falling into an open trap door in the platform of the station as she was passing over it from one street to another. The court, in its opinion, describes the situation as follows :

> "The railroad station at which the accident happened is so situated that its grounds upon the west and south are contiguous to public streets, Prescott street on the west and Lincoln Square on the south. The grounds are unenclosed, and their surface is of

substantially the same level and appearance with the streets, so that no line of demarcation is apparent. The station building is surrounded by a platform elevated one step above the ground, and the platform continues southerly along the railroad track to Lincoln Square. In the other direction, the platform is distant at its northwest corner about twenty-five feet from the easterly line of the other street. The surface of the station grounds between the streets and the platform was in a suitable condition for public travel, and was very much used by teams and foot passengers in going to and from the station, and in traveling across the station grounds from one street to the other. There was no sidewalk or other defined foot path on the east side of Prescott street next to the station grounds, but there was a brick sidewalk on the west side of Prescott street extending to Lincoln Square. There was a path trodden by foot passengers extending diagonally across Prescott street and the northerly portion of the open station grounds towards the northwest corner of the platform. The route by this path and the platform on the west and south sides of the station building, and thence southerly by the platform next the tracks between the northerly part of Prescott street and the square at the end of the platform, was a hundred or more feet shorter than that by the public streets. A large number of persons not passengers or having business at the station went over the platform daily, in passing by this short cut from one street to the other. There was no evidence whether the defendant made any attempt to prevent this travel, and none that it permitted it except that it existed in fact. There was also evidence that many people went over the platform on the east side of the station, and some along or between the railroad tracks, when going to Lincoln Square from points northerly of the station." . . .

After holding that the plaintiff was a licensee, the court proceeds:

"The general rule is, that a bare licensee has no

> cause of action on account of dangers existing in the place he is permitted to enter, but goes there at his own risk, and must take the premises as he finds them. Reardon *vs.* Thompson, 149 Mass. 267; Parker *vs.* Portland Publishing Co., 69 Maine, 173. No duty is cast upon the owner to take care of the licensee, or to see that he does not go to a dangerous place, but he must take his permission with its concomitant conditions and perils, and can not recover for injuries caused by obstructions or pitfalls. Hounsell *vs.* Smyth, 7 C. B. (N. S.) 731; Batchelor *vs.* Fortescue, 11 Q. B. D. 474; Sweeny *vs.* Old Colony & Newport Railroad, 10 Allen, 368, 372. 'An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril.' Holmes, J., in Reardon *vs.* Thompson, 149 Mass. 267, 268; Sullivan *vs.* Waters, 14 Ir. C. L. 460, 475."

In Gillis *vs.* Pa. R. R. Co., 59 Pa. St. 129, plaintiff was one of a crowd that had collected on the platform at defendant's station for the purpose of seeing a President of the United States, who was traveling over defendant's road. The platform gave away, thereby causing the injuries complained of.

> "By court, Sharswood, J. The platform of a railroad company at its station or stopping place is in no sense a public highway. There is no dedication to public use as such. It is a structure erected expressly for the accommodation of passengers arriving and departing in the train. Being uninclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so. The servants of the company, after requesting them to leave, can remove them by whatever force may be necessary."

After holding that a railroad company is not liable for negligence to a trespasser, but only for wilful injury, and citing authorities in support thereof, the court added:

> "The application of this principle to the determi-

nation of the case in hand is not difficult. The plaintiff may not have been technically a trespasser. The platform was open; there was a general license to pass over it. But he was where he had no legal right to be. His presence there was in no way connected with the purpose for which the platform was constructed. Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by the authority of the defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it. As to all others, they were liable only for wanton or intentional injury. *The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity or to give vent to his patriotic feelings.*" . . .

"However much to be lamented was the sad occurrence which occasioned this suit, and however much sympathy may be felt for those who were injured, and the families of those who lost their lives, we are of the opinion that the circumstances of the case were not such as to cast any pecuniary responsibility on the railroad company, and that the learned judge below was therefore right in directing the jury to find a verdict for the defendants."

The case of Burbank *vs.* Ills. C. R. R. Co., 42 La. Ann. 1156, was a suit for damages for injuries received by the plaintiff by falling through a hole in the platform of the defendant's station, whither she had gone to be present on the arrival of a passenger train.

The court, delivering the opinion, said:

"She was at the depot, it is true, by a general license from the company, in the absence of any express prohibition. It would not be practical for a railroad company, in the immensity of its business,

to designate particular individuals who should be permitted to enter its depot. But there was no express or implied invitation to the plaintiff to go to the depot and on the platform." . . .

"From the evidence in the record we think the fact is clearly established that the plaintiff was on the platform for pleasure only, and not with the intention of transacting any business with the company, or for the purpose of receiving friends expected on the train." . . .

"Railroad platforms are not made for the use of the public; and if persons not invited and having no business with the company are injured in consequence of a defect in the platform, they have no redress. Wharton, Negligence, paragraph 822.

"There was no inducement offered by the defendant to plaintiff which was equivalent to an invitation to go upon the platform. Mere permission, because it is impossible to refuse it, is not an inducement or an invitation to enter on the premises of another. The person entering on the premises of another under such circumstances goes at his own risk, and enjoys the license subject to its attendant perils. The law does not impose the duty upon the owner to keep his premises in a condition of such repair as to suit the convenience of those who go there solely for their own pleasure, and who are not invited or induced to go upon them.

"The defendant company, under the facts in this case, could only be made liable if the uncovered platform through which the plaintiff fell was in its nature a trap. Wharton, Negligence, paragraph 821.

"There must have been on the part of the company such gross and wanton negligence that it was equivalent to intentional mischief. Snyder *vs.* Railroad Co., 42 An. 302."

In that case the plaintiff claimed that she had gone to the train to meet guests, but the court found that she was there for pleasure. While the presence of the plaintiff and his brothers on the platform and crossing is attempted to be accounted for by alleging that they had gone there to meet

their parents, it is manifest that this is a mere pretext. It does not appear that the boys knew what time their parents would arrive, and it appears that their house was near enough to the platform so that they could have gone to it after they could have seen a car approaching from Washington. It also appears that their house was on the eastern side of the track and even if they were waiting near the platform for a car to arrive from Washington there was no occasion for them to cross the tracks until they saw one approaching from that direction, and the evidence shows that there was none at the time in sight, although one could have been seen for 500 feet or more. Besides the evidence shows that they had been playing about the platform for an hour or more. They were undoubtedly there for pleasure and not to meet their parents. While the evidence shows that persons occasionally though rarely crossed there the evidence shows affirmatively that the plaintiff *was not there for that purpose at that time.* Putting it most favorably for the plaintiff, he was a mere licensee for his own pleasure, at the time of the accident, and the defendant, therefore, owed him no duty, except the negative one not to intentionally injure him. The facts bring the case fully within the rule of those above cited.

Nor would the fact that plaintiff was an infant alter the rule.

In the case of Felton *vs.* Aubrey, 74 Fed. Rep. 350 (U. S. C. C. A. 6th Circuit) a verdict and judgment obtained in the court below by the defendant in error, a boy of nine years, against the plaintiff in error, as receiver of a railroad company, was reversed because of error in giving and refusing instructions. The boy was injured by being run over by a train of freight cars within the city limits of the city of Lexington, Ky. The track at the place of the accident was laid across a common, over which people passed frequently, and in so doing crossed the track at the place in question. The evidence on behalf of the plaintiff tended to show that

he crossed the track diagonally and while doing so was struck by a train going at a rapid rate, while that on behalf of the defendant tended to show that he tried to board a car of the passing train and was thrown and run over. In speaking of the youth of the plaintiff, and the necessity of the defendant exercising greater care towards him than an adult, the court also stated that however young the plaintiff the defendant would not be liable unless it was guilty of negligence, and in that connection said :

> "If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous. We do not think this distinction was made plain to the jury."

After quoting from the charge upon the question of contributory negligence, the court said :

> "This charge is subject to the criticism that the jury might well infer that the immatureness of the plaintiff would excuse his conduct, and cast a liability upon the company, not because it had been guilty of any wrong, but because an immature and irresponsible person had been hurt without fault of the railway company."

Speaking of the liability to trespassers and licensees, the court said :

> "So there are many cases which seem to recognize no distinction whatever between the liability to implied licensees upon the premises of a railroad company at places where the company is legally entitled to the exclusive occupation and those who go upon the premises as mere naked trespassers. In both cases the company has been held to come under no duty or obligation towards such persons until their danger is apparent. Of this class of cases the following may be cited as types" (citing cases).

The case last cited shows that the duty to a licensee is the same, and only the same, as to a trespasser. The cases

all agree that the only duty which a railroad company owes to a trespasser is the negative one not to intentionally injure him.

Morrissey *vs.* Eastern Railroad Company, 126 Mass. 377 :

Defendant's railway train ran over and injured a child four years of age, walking on its track. The place in question was a cutting through a ledge, near which the plaintiff lived with his mother. There were houses on both sides of the track upon the ledge and beyond it, and the cutting was unfenced at both ends. The cutting was 400 feet from the public street, but people were accustomed to pass through it.

The upper court, in sustaining a verdict for the defendant, said:

> "The plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad track. No inducement or implied invitation to him to enter upon it had been held out. He was neither a passenger nor on his way to become one, but was there merely for his own amusement, and was using a track as a playground. The defendant corporation owed him no duty, except the negative one not maliciously or with gross and reckless carelessness to run over him."

Baltimore & Ohio Railroad Co. *vs.* Schwindling, 101 Penn. St. 258 :

A boy, five or six years old, went for his own amusement on the platform of a railway station, and stood at the edge to watch an approaching train. The train drew up at the rate of three or four miles an hour, and an iron step, bent and projecting a few inches outward, struck and injured him.

The plaintiff had judgment below.

The court, in reversing judgment for the plaintiff, said:

> "At the time plaintiff received his injury he was

standing on the platform of the defendant, so close to its edge that according to the theory upon which the case was tried for the plaintiff, he was struck by a slight projection from the side of a passing freight car. He was not a passenger, he had no business of any kind with the defendant or any of its agents or employees; in fact he was a boy about five or six years of age amusing himself, looking at the moving train. He was not invited upon the platform by any agent of the defendant, and he was not engaged in the act of crossing either the track or the platform at the time of the accident. He was simply loitering upon the edge of the platform with no other purpose or motive than his own personal enjoyment." . . .

"When the right to cross at a particular place is established, by permission or otherwise, the duty of ordinary care is incumbent upon the company. But in the present case the plaintiff was not engaged in the act of crossing the track or even the platform when he was injured, and therefore the cases on this subject are not in point."

See, also, the case of C. A. & C. Ry. Co. *vs.* Workman, Admr., 66 Ohio State, 509, which shows that the plaintiff in this case should be considered a licensee.

C and D.

Points C and D present the question of THE ALLEGED NEGLIGENCE OF THE MOTORMAN.

Where a person is discovered lawfully or unlawfully on the track in front of an approaching train, the motorman or engineer may properly presume that the party will leave the track in time to avoid injury, unless or until he discovers something to indicate that the person can not or will not do so, and if he uses all available means to stop the train as soon as he makes such discovery, he is not guilty of negligence. This rule applies in cases of infants old enough

to have appreciation of danger. The following cases fully support this rule:

R. & D. R. R. Co. *vs.* Didzoneit, 1 D. C. App. 482.
Cullen *vs.* R. R. Co., 8 D. C. App. 69.
Stabenau *vs.* R. R. Co., 155 N. Y. 511.
Fenton *vs.* Second Ave. R. R. Co., 126 N. Y. 625.
Chrystal *vs.* T. & B. R. R. Co., 105 N. Y. 164.
P. R. R. Co. *vs.* Hummell, 44 Pa. St. 379.
Foley *vs.* N. Y. C. & H. R. R. Co., 78 Hun, 248.
Alabama G. S. R. Co. *vs.* Burgess, 114 Ala. 587.
P. R. R. Co. *vs.* Morgan, 82 Pa. St. 134.
Norwood *vs.* R. & G. R. Co., 111 N. C. 236.
High *vs.* C. C. R. Co., 112 N. C. 385.
B. & O. R. R. Co. *vs.* Schroeder, 69 Md. 558.
Nellis on Street Railways, p. 302.

In the case of the Richmond and Danville Railroad Co. *vs.* Didzoneit, 1st Appeal Cases, D. C. 482, the court, in its opinion, states the material facts as follows:

"The plaintiff, a boy about sixteen years of age, was injured at Manassas, in the State of Virginia, on August 24, 1889, by having his foot crushed by an engine attached to a freight train of the Richmond and Danville R. R. Co., while he was sitting on a platform adjacent to the company's track with his foot on the rail, . . . and, it seems, went to sleep. While he sat there, a freight train came up from the south and stopped in front of a hotel about forty yards from the place where the boy was. A street intervened between the hotel and the platform, but the track was quite straight for a considerable distance.

"The engineer of the freight train alighted from his engine, as he says, to receive orders. Returning to his engine, he set it in motion in order to proceed onwards. Immediately after starting, he noticed the boy sitting on the platform, with his head resting on his hand and his face turned southward in the

direction from which the train was moving. When he got closer, he noticed that the boy's eyes were closed, and he immediately reversed his engine and stopped the train, which was not moving at a greater rate than three or four miles an hour. It was too late, however. One wheel of the engine passed over the boy's foot and partly crushed it. The engineer stated in his testimony that, while he noticed the boy after he had started his train, he did not stop immediately because he supposed the boy would move; and he did not notice that the boy had his foot on the rail. These are the substantial facts of the case as they were developed at the trial" (pp. 483–4).

In that case the question was whether the plaintiff should be excused for his contributory negligence on the ground that the defendant might, by the use of due diligence, have avoided the consequence of the plaintiff's negligence and avoided the injury; but the same rule would apply to the case at bar in determining that whether the conduct of the motorman was negligent. Upon this question the court, after referring to other cases, said:

"From this it is plain that the defendant's liability in such cases is based upon the fact that it had, or must have had, actual knowledge of the plaintiff's danger, and that the negligence for which it is responsible is negligence supervening after discovery of such danger." . . .

"In the present case there is no proof whatever that the defendant at any time before the accident knew the existence of the dangerous condition in which this plaintiff had improvidently placed himself. That dangerous condition is assumed to have been that the boy was asleep on the platform, in too close proximity to the railroad track. According to the uncontradicted testimony of the engineer, the fact that the boy was asleep did not become apparent to him until it was too late to prevent the accident; and there is nothing in the circumstances of the case that would justify the presumption that his state-

ment was false, or that he had knowledge of the boy's condition, or that after his discovery of this condition he did not use all the care and prudence that he could to prevent the accident. When he first saw the boy he had no reason to suppose that the boy was not in the full possession of his senses, and would not move away, as any prudent person would do" (pp. 487–8).

The language of the court in the foregoing quotation to the effect that the uncontradicted testimony of the engineer was that he expected the boy to remove from his dangerous position, and that it did not become apparent to him that he would not do so until he was too close to him to avoid the accident, applies with great force to this case, as it was admitted by the counsel for the appellee and the court below that the motorman did all he could to stop the car after he discovered that the boy's foot was caught in the space, and the evidence on behalf of the appellee shows that the waving that was done commenced at substantially the same time that the motorman discovered that the boy's foot was fast, so that there was nothing to indicate to the motorman that the boy would not leave the track as the car approached him, as he had formerly done, until he discovered that his foot was fast.

In the subsequent case of Cullen *vs.* Railroad Co., 8 App. Cases, D. C., 69, under a similar state of facts, the same ruling was adhered to after very able arguments and a critical examination of the rule by this court.

The doctrine of these two cases applies with equal force in a case like the one at bar, where, as we contend, the plaintiff was not placed in his perilous position by any act of negligence on the part of the defendant. The rule in each class of cases is the same, that is, that in order for the defendant to be liable, there must be an independent act of negligence on its part after the actual discovery of the plaintiff's peril.

In the case of Stabenau *vs.* Railroad Company, 155 N. Y.

511, where a girl of seven years of age was injured by being struck by an electric car, there was judgment for the plaintiff in the court below. In the opinion of the Court of Appeals, reversing the judgment, the court states the facts at page 513 as follows:

> "The evidence showed the following state of facts: The plaintiff's daughter was about seven years of age. At about seven o'clock in the evening of January 19th, 1894, one of the defendant's trolley cars, on its way to Brooklyn, had left the station at Van Pelt Manor, with two motormen upon the front platform. When within less than one hundred feet of the crossing, where the accident occurred, several little girls were seen upon or near it. They were seen to start and to run over the crossing in front of the car. One of them, the plaintiff's daughter, fell and, immediately, the motorman applied the brake upon the car and brought it to a stop upon the crossing. The child's body was prostrate and outside of the track, at a point between the front and rear wheels. Upon raising up the child, examination showed that her foot and ankle had been struck by some part of the running gear and injured. Although there is no direct evidence as to how she had fallen, it might be inferred that her foot had been caught between the outside rail of the track and the plank of the crossing, with the effect that she had been unable to extricate it and was thereby thrown down. The crossing upon which the child was injured was used for traffic and the planks had become worn and broken in places. At the point where the child fell, there was a space between the outside rail and the adjoining plank of from 2 to 3 inches. There was a crossing for foot passengers; but, for the purpose of this case, the child may be assumed to have been rightly upon the traffic crossing, and the question of the defendant's negligence is to be solved by the conduct of the motorman when approaching the crossing."

On page 514 the court said:

> "The car was going at the usual rate of speed through a rural district and, although it was possible

to have stopped it before reaching the crossing, there was, obviously, no occasion to do so, until the child was seen to fall." . . .

"No negligence was attributable to him (the motorman), because he did not apply the brake before the child fell; for it was then, for the first time, that the peril became apparent" (citing Fenton *vs.* Railroad Company, supra).

On page 515 the opinion continues:

"Whether her fall was from her foot being caught, or from merely tripping, is not definitely known; nor is it, perhaps, material upon the question of the defendant's negligence; because until she was seen to fall, the motorman was under no obligation to bring his car to a stop. It was essential, in this case, to show that the defendant's servant, while engaged in the operation of the car, committed some act which he ought not to have done, or omitted some act incumbent upon him. As I regard the case, I fail to discover wherein any negligence was attributable to the defendant, which was the proximate cause of the accident."

Our case is a stronger one for reversal than the one from which the foregoing quotations are made. In that case the plaintiff was treated as rightfully upon the track, while in the present case, as hereinbefore shown, the plaintiff, if not a trespasser, was a licensee. He had no occasion to be upon the track at the time and place when and where he was.

In the case of Fenton, administrator, *vs.* Second Avenue Railroad Company, 126 N. Y. 625, the deceased, for whose death the suit was brought, a boy about nine years old, attempted to cross the street in front of an approaching car, when it was far enough from him to have enabled him to do so in safety had he not fallen. He fell on the track and the car passed over him and killed him. The evidence on behalf of the plaintiff tended to show that the boy fell when the horses were about twenty feet from him; that a person near the car saw the boy about to cross and hallooed to the

driver before the boy fell, but he was looking another way and did not attempt to stop the car until the horses struck the boy. The evidence on behalf of the defendant tended to show that the driver did not see the boy until he fell on the track about ten feet in front of the horses, and immediately did all he could to stop the car, and that he did not hear the person on the street halloa. It was alleged that the driver was negligent in not stopping the car sooner. The plaintiff had a verdict and judgment below. The Court of Appeals, in an opinion reversing the judgment, said:

> "If it be assumed that the boy fell twenty feet in front of the horses, as testified to by one of the plaintiff's witnesses, then the horses going at the usual rate of speed, assuming it to be six miles an hour, would have reached him in about two seconds, and that was all the time the drivers had to see the peril, apply the brake and arrest the motion of the car before reaching him, and there is no evidence that, by the exercise of all the vigilance that the law requires of drivers under such circumstances, they could, after the boy had fallen upon the track, have arrested the car in time to save him from injury. If it be assumed that they saw him as he approached the track they had the same reason to suppose that he would get across that he had, and he probably would have crossed in front of the horses in safety if he had not fallen. No negligence can be attributed to the drivers because they did not apply the brake before the boy fell, because then, for the first time, the peril commenced and became apparent." . . .
>
> "Street railway cars have a preference in the streets and while they must be managed with care so as not to carelessly injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way. The unfortunate death of this boy was due to his own carelessness, or it was a pure accident, and in either event the defendant can not be held responsible for it."

In the case at bar the greatest distance any witness puts

the car from the boy when the waving is said to have commenced was forty-six and one-half feet, and the car was running eight or nine miles an hour, which gave about the same time in which to stop as there was in the Fenton case. In our case there was nothing to indicate danger until the waving, or the motorman saw that the boy's foot was caught, both of which occurred about the same time, according to the evidence in the record.

In the case of Chrystal *vs.* T. & B. R. R. Co., 105 N. Y. 164, an infant seventeen months old was run over and severely injured at a railroad crossing. He had a verdict and judgment below which were reversed by the Court of Appeals. From the opinion, delivered by Earl, J., we quote the following:

> "This is the first case that has come before this court, and, as far as we know, before any court in this State, wherein must be defined the responsibilities of a steam railroad company, not otherwise in fault, to one lawfully upon its track, for not seeing him and stopping its train in time to avoid injuring him.
>
> "It was in evidence, by a witness produced by the plaintiff, that plaintiff could be seen upon the track at a point about 500 feet from where he was injured. . . .
>
> "But there can be no doubt, upon this evidence, that after the engineer discovered that the child was in peril he did all he could to arrest the motion of the train. That he wilfully and recklessly ran upon him after he discovered that he was in peril is inconceivable, and certainly can not be assumed. An engineer is not bound to stop his train the moment he sees some living object upon the track. He has the right, in broad daylight, when his train is perfectly visible and its approach must be heard and known, at least in the first instance, to assume that the object, whatever it is, will leave the track in time to escape injury. He is not bound to expect helpless infants upon the track without sufficient knowledge or ability to escape when warned of danger. He

> could not know when he first saw the plaintiff that he was too young to be conscious of the danger to which he was exposed, and without the imputation of negligence he could run on until he discovered that he was heedless of the danger."

In the case at bar the plaintiff was old enough to appreciate danger and escape it, and the motorman was justified in assuming that he would do so until he discovered that he could not.

In the case of P. R. R. R. Co. *vs.* Hummell, 44 Pa. St. 379, where a boy seven years old was injured, while walking beside a train that crossed his father's lot a few feet from the house, it was contended that the company was guilty of negligence in not ringing a bell and looking out for children who were known to frequent the place, there was a verdict and judgment for the plaintiff, and in reversing it upon the ground that there was no negligence proved, because the defendant owed the plaintiff no duty, the court, by Mr. Justice Strong, amongst other things, said:

> "Precaution is a duty in so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act."

In the case of Foley *vs.* N. Y. C. & H. R. R. Co., 78 Hun. 248, a boy between four and five years old was killed by walking along a railroad track, where it had been customary for people to walk. In an opinion affirming the judgment of the trial court in directing a verdict for the defendant, the Supreme Court of New York said, on page 251 of the reporter:

> "The engineer was on his guard, and his testimony is all we have to prove what he saw. He did see the children and sounded the alarm, but he was not then bound to stop his train, as it was light and there was no noise to drown the blast of the whistle; he had a right to assume that the children

would hear the alarm and leave the track, as there was no difficulty in their so doing. They had only to step aside a few feet upon the other track, and he could not assume that either of them would fall.

" 'All the engineer was bound to do after the discovery of the peril was to use reasonable diligence and care to avoid it.' "

In the case of Alabama G. S. R. Co. *vs.* Burgess, 114 Ala. 587; s. c., 22 Southern Rep. 169, in which a boy seven years of age was injured by being run over by a train while he was crossing a trestle, and there was a verdict and judgment for the plaintiff, the Supreme Court of Alabama reversed the case because of error in giving the following instruction:

"The court charges the jury that, if they are reasonably satisfied, from the evidence, that the engineer saw the child on the track and saw that he was in peril, in time to avoid injuring him by the exercise of reasonable diligence, and they further believe that the engineer failed to exercise such reasonable diligence to avoid injury to the plaintiff, such failure would be wanton negligence, and the plaintiff would be entitled to recover such damages as the jury think he is entitled to recover in this case, not exceeding $25,000, if the jury believe plaintiff was injured by the failure to use reasonable diligence to avoid plaintiff's injury."

The ground of error, as stated by the court in its opinion, is to the effect that the instruction was too general and did not define to the jury what the duty of the engineer was under the particular facts of the case. In other words, that it failed to inform the jury that if he used all reasonable means of stopping the train after he discovered the plaintiff in peril that there was no negligence.

In the case of Norwood *vs.* R. & G. R. Co., 111 N. C. 236; s. c., 16th Southeastern Reporter, 4, where a man was run over by an engine while he was walking on the railroad

track or sitting on the end of cross-ties at a place where persons were accustomed to walk on the right-of-way, the Supreme Court of North Carolina, affirming a judgment for the defendant directed by the court below, said:

> "If it were conceded that the engineer saw the deceased walking along the track or sitting upright on the end of a cross-tie, in time to have stopped the train without peril or difficulty, he was justified in believing up to the last moment, in the absence of knowledge or information that he was insane or deaf, that intestate would take reasonable precaution for his own safety by moving out of the way. McAdoo *vs.* Railroad Co., supra; Daily *vs.* Railroad Co., 106 N. C. 301, 11 S. E. Rep. 320. It is not material whether (in passing upon the questions involved in this case) the intestate went upon the road under a license or as a trespasser. 'The license to use does not carry with it the right to obstruct the road and impede the passing of trains.'"

In the case of High *vs.* C. C. R. Co., 112 N. C. 385; s. c., 17th S. E. Rep. 79, where a woman was run over and injured under like circumstances mentioned in the next preceding case, there was similar action on the part of the court, and in the opinion it is said:

> "Where an engineer sees, on the track in front of the engine which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid the injury; and if such person is injured the law imputes it to his own negligence, and holds the railroad company blameless."

In the case of B. & O. R. R. Co. *vs.* Schroeder, 69th Md. 551, where a person was run over and killed on the tracks of the railroad company in the city of Baltimore, a judgment for the plaintiff was reversed. In the opinion of the

court, delivered by Mr. Chief Justice Alvey, it is said on page 558 of the report:

> "But where a party is discovered on the track, in the exercise of full power of locomotion, and no impediment to his escape, those on the train may well act upon the assumption that he will use his senses for his protection, and get out of the way of danger before he is struck."

Frost et. al. *vs.* R. R. Co., 96 Mich. 470:

Plaintiffs, at the time of the accident, were attempting to cross the defendant's tracks with a sled, on which they were hauling logs. While standing on the crossing, the horses being unable to move the load, a train ran into the sled and killed two horses. The engineer testified that it may have been five seconds from the time he first saw the object till he whistled for the brakes. The Supreme Court of Michigan, in reversing a judgment for the plaintiff, said:

> "There is no evidence that the engineer did not use every effort to stop the train as soon as he saw the danger." . . .
>
> "The engineer was not called upon to check the speed of the train until he was signaled, or was near enough to see the danger himself."

As shown under the preceding point, the plaintiff if not a trespasser was a mere licensee, and the duty of railroad companies to infant trespassers or licensees is stated in Elliott on Railroads, sec. 1259, as follows:

> "In actions for injuries to children, as in other cases, there can be no recovery unless defendant has been guilty of a breach of duty. . . . There is a sharp conflict among the authorities, however, as to what the duty of a railroad company is to children who come upon its premises as trespassers or mere licensees. We believe the true rule to be that, although the age of the child may be important in determining the question of contributory negligence,

> or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees, not invited or enticed by it, than it is to keep them safe for adults."

It was suggested in the court below that the defendant might be liable upon the principle laid down in the turntable and similar cases, but it is clear that that principle does not apply here, as is shown by the opinion of the Supreme Court of Rhode Island in Bishop *vs.* Union R. R. Co., 14 R. I. 314, a case similar to the one at bar, where that court after citing Railroad Company *vs.* Stout, 17 Wall, and two others, involving the same principle, said:

> "We know of no cases more favorable to the plaintiff than the three cases last cited, but in all three of them the object which caused the injury was a dangerous object left exposed, without guard or attendant, in a place of public or common resort for children. An object so left is a standing temptation to the natural curiosity of a child to examine it, or to his instinctive propensity to meddle or play with it." . . . The court adds: "The case at bar differs very much from the three cases previously stated, for in the case at bar the cars, instead of being left unattended, were in the charge of the driver, who was in the act of driving them, so that there was nothing done to encourage the trespass, which was merely the result of momentary impulse. Ordinarily a man who is using his property in a public place is not obliged to employ a special guard to protect it from intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such a vehicle to keep an outrider on purpose to drive such boys away, and that, if he does not, he is liable to any one who is injured while thus secretly stealing a ride. In such a case no duty of care is incurred."

Many cases are cited in that opinion sustaining the point. See, also, cases on same point cited in a note in 3 Am. Neg. Rep. p. 320.

In the case of Pa. R. R. Co. *vs.* Morgan, 82 Pa. St. 134, the facts were quite similar to those in the present case. They are stated as follows by the reporter:

> "At the trial it appeared that at about five o'clock in the afternoon of October 15, 1874, a gravel and repair train, consisting of an engine, ten dump and truck cars, and a caboose car, was backing on the Morrison Cove Branch, on a slightly down grade, with the caboose car on the front and the engine on the rear. The train hands in charge consisted of a fireman and a flagman, both of whom were on the front of the caboose car upon the lookout, and also of the engineer and a brakeman, both of whom were upon the engine.
>
> "The place at which the accident occurred was a sparsely-settled district just outside the borough lines of Hollidaysburg.
>
> "The evidence as to the speed of the train at the time was conflicting; for the plaintiff there was evidence tending to prove that the speed was very great, but the evidence of the defendant, which seemed to have more weight, was that the train was not moving faster than six miles an hour, the rate allowed by the rules of the company.
>
> "There was but a very slight curve in the road at this point, and nothing to obstruct the view of the track for a long distance. As the train approached a private crossing, and when it was at the distance of about 520 feet from the crossing, the hands on the front of the train saw the plaintiff, then a child of about five years of age, and a little boy, upon the track at this crossing. Nothing was then done to stop the train. When within 163 feet of the children one of the train hands called to the children to get off the track. They started to run off immediately; the boy ran straight across the track and got safely off; the girl started to run diagonally off, and in doing so caught her foot inside the rail, and between it and

> the plank, in the space left for the flange of the wheel. As soon as the train hands saw her predicament, the train then being within about 100 feet of the child, they applied the brakes, and signalled the engineer, who reversed the engine. Although every possible exertion was used, it was impossible to stop the train until the front car had run about 60 feet past the crossing. Meantime the child's mother and one of the neighbors had run to her assistance and endeavored to extricate the foot. Not being able to do this in time, as the train passed, they held the child's body as far out of the way as possible, so that the front wheel of the caboose car, sliding under the pressure of the brake, appeared to have pushed the plaintiff's foot out of her shoe, lacerating the foot and producing, as was testified, a permanent injury. The shoe was left sticking in the space between the rail and the plank, where it was first caught." . . .
>
> "There was some evidence that the plaintiff's foot was caught in a hole outside of the track, negligently left there by the defendant, but the weight of the evidence was clearly that the hole was, as above stated, inside of the rail.
>
> "It did not appear that the plaintiff was lawfully upon the track at the time of the accident. The crossing upon which she was playing at the time was entirely a private one, the use of which was confined to a few families, including that of the plaintiff, but it was built and maintained by the company." . . .

Speaking of the manner in which plaintiff's foot was caught, the court said, at p. 139:

> "We concur in the view of the judge that the foot of the plaintiff must have been caught in the space left for the flange of the car wheels, between the rail and the inner plank of the crossing, and, therefore, that the injury arose from no defect in the construction of the crossing." . . .

In that case it appeared as in this that the persons in charge of the train saw the plaintiff when far enough away to have stopped the train before reaching her, and the court below, as stated by the Supreme Court in its opinion,

charged the jury substantially that if the defendant's employees in charge of the train had time to stop it after discovering the plaintiff, they were guilty of negligence in not doing so. Speaking of the charge and the case of P. & R. R. R. Co. *vs.* Spearen, 11 Wright, 300, from which it was taken, the Supreme Court said:

> "But that case states no inexorable rule, that a train must stop under all circumstances when a child is seen upon a track; on the contrary, if its appearance there is so sudden and unexpected that the engineer is incapable of exercising the necessary measure of care to save it, the child is without remedy. In principle this is not different from a case where a sudden change of circumstances causes an accident to a child, where immediately before there was no reason to believe an injury would ensue."
>
> 82 Pa. St. 141.

And the court held that the instruction was erroneous, and reversed a judgment in favor of plaintiff.

It will be observed by reference to plaintiff's instruction No. 1 (Rec. p. 38), given in the case at bar, that the court below upon the point in question charged the jury substantially as was done in the Pennsylvania case.

The plaintiff, to sustain his contention in the court below that the case should be submitted to the jury, and that the instructions asked on behalf of the defendant should not be granted, relied largely upon the case of Spooner *vs.* D. L. & W. R. R. Co., 115 N. Y. 22. While the facts in that case were similar to those in the case at bar, and were submitted to the jury, there was a conflict of evidence in that case upon both grounds of alleged negligence. The plank between which and the rail the child's foot was caught had been recently placed there, before the accident, in repairing the crossing, and was different in construction from other planks at that and other crossings on that and other roads. Upon that point the court said, at pages 31 and 32 of the report:

> "The plank at the point of the accident was new

> and laid parallel with the rail on its inside and two and a half inches therefrom. It was laid with a straight edge, and the opening thus made for the flanges of passing wheels was the one in which the child's foot was caught. The other planks at the same crossing had the edge of the plank parallel to the rail beveled off or rounded, so that at the bottom it touched the rail and the flanges had room to pass-while no opening, such as to catch or fasten an in, cautious foot, was left. There is evidence that a similar mode of construction existed at many other crossings of the company, and was uniformly used upon some other railroads, although many retained the straight edges."

There were no such facts appearing in the case at bar, and no evidence whatever given on behalf of the plaintiff tending to show defective or improper construction. The testimony of Mr Lewin, in behalf of the plaintiff, did not tend to show that the construction at the two crossings mentioned by him was different from that where the accident happened. The crossings mentioned by him were where vehicles crossed the tracks and his evidence showed that the depth of the space between the plank and the track was somewhat filled with earth, while the evidence on behalf of the defendant showed that it is customary to have men go along constantly and clean them out. The clear inference from the opinion in the Spooner case is that, if there had been no conflicting evidence in that case upon the question of negligent construction, an instruction that the jury could find no negligence in that particular would have been proper. Certainly that case supports the position that the defendant's fifth instruction (Rec. p. 40) should have been given.

Also upon the question of whether the engineer was guilty of negligence in not stopping the train sooner the evidence in the Spooner case differed widely from that in the present case. In that case the evidence showed that the

engineer did not check his train as soon as he saw the plaintiff upon the track waving her hands. Upon that point the court said, at page 33:

> "Between Roseville station and the Greenwood avenue station there is no obstruction to the view in either direction, except possibly the bridge over the track, which was eight hundred and fifty-four feet from the scene of the accident. The plaintiff saw the train beyond the bridge at Roseville. The engineer while at that station either saw or might have seen the plaintiff upon the track. At all events, he did see her as he passed the bridge. He then saw a small child upon the track waving her hands and not stepping aside. He should have checked his train at once. There was ample time in which to do it, for he swears that he could and did stop it within three hundred and sixty feet. On this state of facts the action of the engineer raised a question of negligence for the jury, and it was for them to say whether he ought not to have acted sooner in presence of what he saw before him."

In our case the motorman testified that he saw no waving of hands by plaintiff or any one else. The testimony, on behalf of the plaintiff, shows that the car was too near the plaintiff to be stopped when the plaintiff and his brother commenced waving their hands. That distance was stated by them to be from 47 to 28 feet (Rec. pp. 10 and 11). The motorman says he was about 30 to 35 feet away from the boy when he saw that his foot was caught, and he then stopped his car as soon as he could. According to the evidence, he commenced to stop the car about the time the boys commenced to wave (Rec. p. 19). It is admitted that after the motorman saw that the plaintiff had his foot fast he stopped as quickly as it was possible to do so. See record, page 46, where the court said, in its charge:

> "Of course it is admitted by counsel, and they will not undertake to escape from that admission, that as soon as the motorman saw that the boy's foot was

> caught there, he did everything to stop the car that he could do. I have no doubt the motorman did that."

In this state of the evidence there was nothing upon which to base a finding that the motorman was guilty of negligence, and that question should not have been submitted to the jury.

In the Spooner case, inasmuch as the evidence tended to show that the engineer did not check his train as soon as he saw the plaintiff waving her hands, the question of his negligence was properly submitted to the jury, but in that case the court instructed the jury as follows upon that point:

> "If, as soon as the engineer saw the plaintiff fall upon the track, or discovered that, for some reason she could not or might not get out of the way in time, he made diligent use of all the means at his command, in order to stop the train and avoid injuring the plaintiff, he did all that he was required to do, and was guilty of no negligence."

On the same page the Court of Appeals, speaking of the instruction asked by the defendant in that case to the effect that the engineer had the right to act upon the assumption that the plaintiff would step aside, and which was refused by the court below, said:

> "That would have been true if all that the engineer could see was a young child on the track (Crystal *vs.* Troy & Boston R. R. Co., 105 N. Y. 164). But when he reached the bridge more than that was obvious. Ethel did not move aside, and was waving her hands and trying to signal the engineer. While he could not see her foot fast in the crossing, he could see that for some reason she did not leave the track and that something unusual had happened. He should have taken the alarm at once and was imprudent for his delay."

It is submitted that the instruction given in the Spooner case was substantially the equivalent of defendant's instructions numbered two and six (Rec. pp. 39, 40, and 41), and what is said by the court in that case shows that our instructions last above referred to should have been given.

Specification of Errors in Instructions and in Refusing to Instruct.

In view of the principles established by the foregoing authorities, it is submitted that the court should have directed the jury to find a verdict for the defendant upon the whole evidence, as requested by defendant's counsel (Rec. p. 38). There was no sufficient evidence to sustain a verdict holding the defendant guilty of negligence, either in the construction of the track at the point in question or in the management of the car.

Defendant's instructions numbered two and three (Rec. p. 39) requested, after the court had rejected his first prayer, present, separately, first, that there was no sufficient evidence to go to the jury upon the allegation of negligent construction; and second, that there was not sufficient evidence upon the allegation of negligent movement of the car, and then ruled adversely to defendant upon each proposition.

There can be no controversy but that the evidence produced on behalf of the defendant established the fact that the construction of the track at the point of the accident was in accordance with the usual and customary method of construction; that it had been in common use in the District of Columbia and elsewhere for many years; that no accident had happened in the District of Columbia because of such construction, and that the officers and agents of the defendant had no notice or knowledge that any such accident had ever happened elsewhere prior to the one in question. There was no evidence introduced on behalf of

the defendant tending to show that there was a better or safer construction and none that any other or different construction had ever been in use here or elsewhere. Nor is there anything in the construction that would indicate to a reasonably prudent person that such an accident was likely to occur. That only two or three cases are found in the books where a similar accident has occurred is conclusive evidence that the contingency of such an accident was very remote and not likely to be suggested to the mind of the most prudent until after its occurrence. Under such circumstances it was error to submit to the jury upon the evidence in the record the question of whether the construction was negligent.

It was also error to submit to the jury the question of whether the motorman was negligent. The foregoing authorities establish fully that the motorman or engineer has the right to assume that the person in front of an approaching car will leave the track if he has notice of the approach in time to enable him to do so, and that he may continue to run on with the usual speed until he shall discover something to indicate to a reasonably prudent man that the person can not or will not leave the track. The motorman under the facts proved in this case had every reason to believe that the plaintiff would leave the track. The gong was repeatedly sounded while the car was sufficiently far from the plaintiff to enable him to do so. He had always done so before that time. He and other boys with whom he associated had frequently prior to the accident stood upon the track until the car was close and then jumped off. The motorman had no reason to suppose that the same occurrence would not be repeated on the occasion of the accident until he saw something to indicate the contrary. He says that the first thing he saw to indicate the contrary was when he was within about 30 or 35 feet of the plaintiff and discovered that his foot was caught between the rail and plank. It was testified by some witnesses that

the plaintiff and his brother waved their hands or hats. The motorman testifies that he did not see such waving. The plaintiff and his brother testified that when they commenced waving the car was from 28 to 48 feet from the plaintiff. It, therefore, appears from all the evidence on behalf of both parties that the motorman discovered that the boy's foot was caught about simultaneously with the waving. That was the first notice he had that the boy was in peril. He testifies that he did all that was possible to stop the car from that time on, and it is admitted that he did so. The court in its charge to the jury (Rec. p. 43) said:

> "Of course, if he (the motorman) saw that the boy's foot was caught it must be his duty to stop just as soon as he can in order to prevent the accident. I have no doubt he did that."

And again the court said (Rec. p. 46):

> "Of course, it is admitted by counsel (for plaintiff), and they will not undertake to escape from that admission, that as soon as the motorman saw that the boy's foot was caught there he did everything to stop the car that he could do. I have no doubt the motorman did that."

It therefore appears conclusively that the motorman did all that under the authorities or in accordance with common experience could be required of him.

But even if it had been proper to submit the case to the jury upon either proposition, the court erred in submitting it. It will be seen by reference to the first instruction given at the instance of the plaintiff that the question of negligence in both instances was submitted to the jury at large without any direction whatever from the court to them as to the duty of defendant in construction, or the duty of the motorman in relation to the movements of his car. The

jury by that instruction were directed to find for the plaintiff—

> *"if they find that leaving the opening in the condition in which it was when the plaintiff's foot was so caught therein was not a reasonable and safe method of maintaining the crossing, or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff he could have stopped the car before it reached the plaintiff"* (Rec. p. 38).

There is not a word in the instruction from beginning to end indicating what was the duty of the defendant as to construction, and it was left to the jury to conjecture as best they could in their own minds, or speculate as they might upon the duty of construction. Proper construction is a mixed question of law and fact. It is error to leave the entire question to the jury, as is shown by the opinion of this court in the case of Asphalt Co. *vs.* Mackey, *supra*, and other cases hereinbefore referred to. It is a well established principle of law that usual and ordinary construction is not negligent construction, unless it be manifestly so to the ordinary mind, and the jury should have been given proper instructions upon this point. Such proper instructions were asked on behalf of the defendant in his instructions 4 and 5 and refused by the court (Rec. pp. 39 and 40).

From the above quotation from complainant's first instruction, it also appears that the jury were given no information whatever as to the duty of the motorman under the circumstances of the case. But, on the contrary, it seems to be intimated by the language—

> *"or that by the exercise of reasonable diligence on the part of the motorman who had charge of the car which injured the plaintiff he could have stopped the car before it reached the plaintiff,"*

that if the jury found from the evidence that he saw the plaintiff on the track when he was far enough away from

him to have stopped the car before he reached the plaintiff it was his duty to do so, which is clearly erroneous. That this is the meaning which the court itself attached to the language quoted is shown by the language of the charge (Rec. p. 43), where the court says:

> *"Should he (the motorman) have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving or before he saw that the boy's foot was caught."*

If that instruction be correct it would be the duty of a motorman or engineer as soon as he saw a person on the track in front of him to commence to stop his train or car in time to come to a standstill before he should reach the spot where he saw the person. That rule applied especially for street cars in cities would render street car traveling nearly or quite as slow as walking, and is unreasonable. It is true, of course, that if a motorman sees upon the track a child apparently so young as not to have any discretion or sense of fear whatever, it would be his duty to stop as soon as he was near enough to discern that the child was of that character, but that does not apply in a case like the present, where the plaintiff was old enough to understand and appreciate the danger of being struck by a car. The rule in cases like the one now before the court is so firmly established by the authorities at the present day as scarcely to admit of discussion. See especially Pa. R. R. Co. *vs.* Morgan and other cases hereinbefore cited. The defendant requested the rule applicable to the case to be given to the jury by the fourth and sixth instructions (Rec. pp. 39, 40, and 41), which the court rejected.

There is nothing in the charge to cure the errors committed by the court by granting the plaintiff's first instruction and rejecting those of the defendant. The jury were nowhere told throughout the whole charge anything that

would indicate to their minds what was the duty of the defendant in relation to construction or the motorman as to the movements or stopping of his car. The charge does little more than define negligence and then leaves the case at large to the jury to speculate whether upon the facts they should find the defendant negligent or not.

Mental Suffering.

There was error in the second instruction, given the jury at the instance of the plaintiff, in that the court instructed that they might consider and allow the plaintiff as one of the elements of damages "*for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg*" (Rec. p. 38). This instruction separated mental suffering from physical suffering and permitted the jury to consider, as a separate element of damages, injury to the plaintiff's feelings, mental pain, humiliation, and grief which he had experienced or might in the future experience from the contemplation of his maimed condition. If the "past" mental pain referred to in the instruction might be considered as connected with and growing out of the physical pain connected with the crushing, amputation, and healing of his leg, the "future" mental suffering therein referred to could have no connection with physical suffering, as there was no evidence tending to show that there would be any physical suffering in the future. The instruction must have been intended by the plaintiff's counsel and the court to refer to mental suffering, anguish, and humiliation, arising from a contemplation of the loss of his leg. Counsel for plaintiff argued to the jury for an enhancement of the damages upon this distinct ground, and counsel for defendant could not object, because under the instruction such argument was proper. This was not a proper element of damages to be considered by the jury, for it is well settled that mental pain, not directly or necessarily connected with the physical pain, is

not a proper element to be considered by the jury in assessing damages.

Bovee *vs.* Danville, 53 Vt. 153.
Chicago & Grand Trunk Ry. Co. *vs.* Spurney, 69 Ill. App. 549.
Giffen *vs.* City of Lewiston, 55 Pac. 545; s. c., 6 Idaho, 231
Morse *vs.* Ducan, Receiver, 14 Fed. 396.
Chicago R. I. & P. Ry. Co. *vs.* Caulfield, 63 Fed. 396.

Bovee *vs.* Danville, 53 Vt. 183, was an action for damages to plaintiff occasioned by her being thrown out of a buggy, by reason of unsafe condition of a roadway. As a result of the injury the plaintiff was prematurely delivered of twin living children, both of whom died. The verdict was for plaintiff. The court instructed the jury that "if this miscarriage was brought about by this injury, any suffering occasioned thereby, *any injuries to her feelings* should be compensated."

In an opinion, reversing the case for error in giving this instruction amongst others, the court, upon the question of damages, said (p. 190):

> "Upon the question of damages the fact of Mrs. Bovee's miscarriage was made prominent at the trial. In the notice a threatened miscarriage is set forth, and in the declaration the actual fact is alleged as one of the injuries sustained. The proofs disclosed the fact that this plaintiff was prematurely delivered of twin living children. The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the neglegence of the town. If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no farther. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote

> to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If like Rachel she wept for her children and would not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented."

In Chicago & Grand Trunk Ry. Co. *vs.* Spruney, 69 Ill. App. 549, the plaintiff was injured through alleged negligence of defendant, whereby he lost a leg. In an opinion, reversing a judgment for plaintiff on the ground of misdirection to the jury, the court said:

> "At the instance of the plaintiff the jury were instructed that in determining the amount of damages they might take into consideration 'any future bodily mental pain or suffering, or future inability to labor or transact business, if any, that the jury believe from the evidence the plaintiff will sustain by reason of injuries received.'
>
> "Future mental pain, that is, mere humiliation and grief resulting from a contemplation of a maimed and disfigured body, is not an element entering into an ascertainment of the pecuniary damage one has sustained as the result of negligence," citing I. C. R. R. Co. *vs.* Cole, 165 Ill. 334.

In the case in 165 Ill. counsel for plaintiff argued to the jury that they might enhance the damages by taking into consideration the plaintiff's mental anguish arising from the contemplation of his physical condition caused by the injury. Upon that point the court, at page 339 of the report, said:

> "These remarks of counsel are improper to the extent that they seek to have the jury infer that their verdict might include damages for future mental anguish which might be suffered by the plaintiff from a contemplation of what might occur. This is not the law nor is it a proper element of damage."

The case was not reversed because the counsel for defendant took no exception to the language of plaintiff's counsel.

In Chic. City Ry. Co. *vs.* Manger, 105 Ill. App. 579, the court, speaking upon the proper measure of damages in a personal injury case, said:

> "In an action predicated upon negligence to recover for personal injuries thereby sustained, a plaintiff is not entitled to damages for mere humiliation or mental annoyance, which he may suffer on account of bodily injuries. Instructions stating the elements of suffering or loss, on account of which a plaintiff is entitled to recover, should not be so drawn as to include mental humiliation."

In the case at bar the instruction was so drawn and no other reasonable meaning can be attached to it, and the jury must have so understood it. The large amount of damages is indicative of this.

In Giffen *vs.* City of Lewiston, 55 Pac. 545; s. c., 6 Idaho, 231, the plaintiff, a woman, fell into an unguarded hole in the sidewalk and was disfigured. The court, in reversing a judgment for plaintiff, said:

> "The trial court did not err in instructing the jury that disfigurement of the plaintiff caused by the injury complained of is an element of damage to be considered by them. Such disfigurement is an element of damage; but annoyance to the plaintiff caused by contemplation of disfigurement is too remote to be considered as an element of damage resulting from personal injury."

In Morse *vs.* Duncan, Receiver, 14 F. 396, plaintiff missed his train by reason of the failure of train to stop at regular station. It was claimed that he could recover for the pain of mind occasioned thereby, but the court said:

> "The general rule is that 'pain of mind' is only the subject of damages when connected with bodily

> injury. It must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity."

In Chic. R. I. & P. R. Co. *vs.* Caulfield, 63 F. 396, the plaintiff, a boy nine years of age, was run down by a train after he had been seen by the engineer, had a verdict and judgment which was reversed for errors, amongst which was the one specified below. The case was heard on appeal before Caldwell, Sanborn, and Thayer, circuit judges, and the court said:

> "The court instructed the jury that in assessing the plaintiff's damages they had a right 'to take into consideration his mental suffering because of his crippled condition, and to take into consideration his physical suffering endured by him while his wounds were healing.' The allusion thus made to 'mental suffering' induced by the plaintiff's crippled condition, as distinguished from 'physical suffering' appears to have been to those feelings of mortification which the plaintiff might experience in after life because he was not sound in body and limb. If such was the idea intended to be conveyed by the instruction, then we think the court erred in allowing the jury to assess damages of that nature" (citing Bovee *vs.* Danville, 53 Vt. 190).

Future Pecuniary Loss.

The specification in the second instruction asked and granted on behalf of the plaintiff that the jury should allow the plaintiff "*for such pecuniary loss as the direct cause of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs*" (*Rec. p. 38*), was also erroneous. In the second preceding part of the instruction the jury were told to allow him for the pain resulting from the injury, for the loss of his leg, and for the inconvenience he has and will in the future suffer from the loss thereof. By

the latter part of this instruction there is superadded the elements of "mental suffering" and "pecuniary loss." The element of mental suffering we have already shown was erroneous. There was no evidence to justify the submission to the jury of the question of pecuniary loss. In order to justify the submission to the jury in such a case, of the question of future pecuniary loss, there must be evidence tending to prove future disability to engage in the plaintiff's usual avocation, and whether such disability is permanent or how long it will continue, what the plaintiff's occupation was and what he could or did earn before the accident, and whether he is wholly or only partially disabled. There is no evidence in the record upon either of these points, and in the nature of the case there could be none. But because the plaintiff was so situated that he could not produce evidence upon this point does not change the rule of law. The plaintiff was not old enough to have any earning capacity. He never had acquired one. If he lives he probably will acquire one in the future. Whether that will be greater or less than it would have been if he had not lost his foot was and is entirely a matter of speculation. Nothing could have been more speculative than to let the jury guess whether the plaintiff's earning power when he becomes an adult will be greater or less than if he had not lost his foot. This is plainly in violation of the rule against the allowance of remote and speculative damages, and the following cases support the principle here contended for:

Staal *vs.* R. R. Co., 107 N. Y. 625.
Strohm *vs.* R. R. Co., 96 N. Y. 305.
Leeds *vs.* Gas Co., 90 N. Y. 28.
Ry. Co. *vs.* Marcus, 2 Am. Neg. R. 490; s. c., 115 Ala. 389.
City of Denver *vs.* Sherrett, 88 F. 226.

Staal *vs.* R. R., 107 N. Y. 625, was an action to recover damages for personal injuries caused by defendant's negligence, where no evidence was given as to the circumstances

and condition in life of plaintiff, his earning power, skill, and capacity. It was held that no damages for future pecuniary loss could be awarded. Part of the charge objected to was: "The jury may allow him his pecuniary losses resulting from his disabilities owing to this accident." This being objected to, the court added: "What the court . . . told you as to pecuniary losses was in connection with the future."

This was held such error as to require reversal.

In Strohm *vs.* R. R. Co., 96 N. Y. 305, the court said;

> "Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining damages."

Could anything be more uncertain and speculative than the future earning power of the plaintiff in the case at bar?

In the case of Leeds *vs.* Gas Co., 90 N. Y. 28, the court charged that the plaintiff was entitled to recover for loss of time. Evidence had been given of such loss, but none tending to show plaintiff's business or his earning capacity. The court, in reversing a judgment for plaintiff for this sole ground of error, said:

> "The charge, therefore, can only be defended upon two grounds—either that evidence of the value of the lost time was given, or, if not, that the jury were at liberty to guess at and speculate upon that value, and estimate it as they pleased. The first ground we have shown to be untenable, and the exception, consequently, requires us to determine the second." . . .
>
> "They were bound to consider it of some value, but could not go beyond nominal damages, and give

compensation for it upon an arbitrary standard of their own. This they were permitted to do. Without proof of the extent or character of the plaintiff's pecuniary loss, they were left to fix it as they pleased." . . .

"For pain and suffering, or injuries to the feelings, there can be no measure of compensation, save the arbitrary judgment of a jury. But that is a rule of necessity. Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If that is not done the jury can not indulge in an arbitrary estimate of their own."

In Ry. Co. *vs.* Marcus, 2 Am. Neg. R. 490; s. c., 115 Ala. 389, the plaintiff, nineteen years old, fell from a hand-car, whereby his spine was injured, and he was permanently paralyzed and crippled. He had judgment below. In reversing it the court said that it was an error to instruct the jury, in the measure of damages, as to probable earnings where there was no evidence as to plaintiff's earning capacity. What the charge was is not reported.

The City of Denver *vs.* Sherrett, 88 F. 226, was an action brought by a woman for injuries sustained by reason of her falling into an excavation. On the question of damages the trial court charged:

"If she is under further disability, if these injuries are permanent in their character, so that she will not hereafter be able to resume her occupation, or resuming it, can not perform the service as efficiently as before, she is entitled to compensation in the degree in which she loses the power to earn money. So that, if you think her powers are permanently impaired, that she will hereafter not be able to carry on her occupation as school teacher, for the length of time for which she is withdrawn from her occupation, she is entitled to such money as she could earn during that time, whether it be one year or more."

In holding this instruction erroneous Judge Shiras, delivering the opinion of the Circuit Court of Appeals, said:

> "In cases wherein the evidence shows that the injury received will affect the ability of the party in the future to earn money, compensation must be made therefor; but the rule is not that the jury must determine the number of years that the disability will continue to exist, and then multiply this number by the yearly compensation the party has earned in the past. Damages for future losses in cases of this kind are not susceptible of computation by a strictly mathematical calculation. Evidence may be given of the age of the party injured, the probable duration of life, the effect the injury has had upon the ability of the person to earn money, of the probability that the injurious effect on the ability to earn money will continue in the future, either during life or for a lesser period, and of the business or occupation in which the person was engaged, and the compensation, whether by wages, fees, by a fixed salary or profits that resulted therefrom; and, from the facts thus proven in evidence, it is for the jury to award such fair sum as will, in their judgment, compensate the party for the decreased or destroyed ability to earn money in the future, due allowance being made for the contingencies and uncertainties that inhere in such matters."

The case last cited well states the facts that must be proved in order to justify the submission of the question of future earning capacity to the jury.

Even if the loss of earning capacity were a proper element of damages the court erred in granting the plaintiff's second instruction because the language of it is such that the jury were permitted to enhance the damages by the loss of earning capacity during the minority of the plaintiff, which is not a proper element of damage in this case. The loss of

earnings during minority could only be recovered by the father.

Texas & P. Ry. Co. *vs.* Morin, 66 Tex. 225.
Ry. Co. *vs.* Evansick, 63 Tex. 54.
H. & T. Ry. Co. *vs.* Boozer, 8 Am. St. R. 615.

In the case of Texas & P. Ry. Co. *vs.* Morin, 18 S. W. 503; 66 Tex. 225, the plaintiff, a child about two and a half years old, recovered a verdict for $20,000 for injuries sustained by reason of negligence of defendant. On question of damages the court instructed the jury:

> "In the event you find damages for the plaintiff in estimating the same you will take into consideration the proof, if any there is, showing the physical condition of the plaintiff at and since the alleged injuries, the probable effect of the injuries in the future upon his health and upon his use of his limbs and generally, and reduction of his power and capacity to earn money, and to pursue the course of life he might but for the injuries, but damages in this cause if any can in no event extend beyond a fair and reasonable compensation for the injuries, and you can not under the pleadings and evidence award exemplary damages, that is, damages by way of punishment."

In reversing the judgment for this error, the Supreme Court of Texas said:

> "This charge was erroneous, in that it permitted the jury to consider in estimating the damages the diminished capacity of the appellee to earn money during the time intervening between the injury and his arrival at majority," citing:
>
> Ry. Co. *vs.* Miller, 51 Tex. 275.
> Sawyer *vs.* Sauer, 10 Kan. 519.

In Ryler *vs.* Evansick, 63 Tex. 54, where a judgment for plaintiff was reversed on the like ground, the court said:

> "The court below having enumerated, in the

charge given, the elements of damage which the jury might take into consideration in a case in which a minor brings suit to recover for injuries to himself, instructed the jury that they might give damages for temporary bodily disability.

"The father of the appellee had recovered for such temporary disability as may have resulted to the appellee to the time of his majority.

"Temporary bodily disability, as an independent element of damages, has relation solely to inability or diminished capacity to labor, and in so far as an injury may affect this, in a case of a minor having a parent entitled to his services, the injury is in legal contemplation to the parent, who alone may recover therefor.

"We regard it as elementary that 'a minor son owing services to his father can not recover for loss of time or inability to labor or earn money during the period of his minority,'" citing cases.

It was also error to instruct the jury, as was done in plaintiff's second instruction (Rec. p. 38), to the effect that they might render a verdict for the full amount of $25,000, claimed in the declaration. That sum was clearly excessive, and the court should not have intimated to the jury that it would be proper for them to award that amount, and the qualification attempted to be made of this in the charge did not cure the error. What the court there said was simply that the instruction was not a suggestion that they should take the $25,000 as a criterion. But he did not say that it would not be proper for them to award $25,000. The substance of the instruction still was that it would be proper for them to award the plaintiff $25,000 if they saw proper to do so. Any reasonable man would say that such a verdict was excessive and therefore illegal. They were in substance told that they had the right to be unreasonable. Such an instruction was held to be error by the Supreme Court of New York in the recent case of Gilbertson *vs.* Ry. Co., 1 Am.

Neg. Rep., 513; s. c., 14 App. Div. (N. Y.), 294. Speaking of that instruction, the court said in that case:

> "Upon the termination of the judge's charge the counsel for the plaintiff made the following request: 'I ask your honor to charge the jury that, taking all the elements into consideration, the jury may award her compensation, fair, reasonable, and just, to any amount not exceeding thirty thousand dollars.' This the court charged and the defendant excepted. This was an intimation to the jury that, under the evidence which had been produced upon the trial, they would have had the right to render a verdict for $30,000, which was clearly not the fact; and this intimation upon the part of the court in regard to the nature of the evidence may have affected their consideration, and may have been in some degree the cause of the large verdict which was rendered. Such a charge was eminently calculated to mislead the jury, and to cause them to regard the evidence of the injuries sustained as of greater gravity than its actual purport required. The learned court did not charge that the plaintiff claimed $30,000, and that the jury were entitled to award such sum as the evidence justified, not exceeding that amount; but did charge them that they might award $30,000, clearly intimating that such a verdict might be upheld upon the evidence in the case. It is evident that a verdict for any such sum would have been extremely excessive. It is also quite clear that the verdict actually rendered was larger than the evidence in the case seems to justify."

This brief was prepared and used by the counsel who appeared for the appellant in the Court of Appeals, and the questions of law presented in this court being the same as were argued and disposed of in the lower court, and the discussion of all of these questions was so full

and elaborate, the counsel appearing in this court on behalf of the plaintiff in error deem it unnecessary to do more than to submit to this court the argument that was filed in and submitted to the Court of Appeals.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

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No. 244.

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vs.

CHARLES B. SEVERE, BY WILLIAM B. SEVERE, HIS NEXT FRIEND, DEFENDANT IN ERROR.

Supplemental Brief on Behalf of Plaintiff in Error.

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FIRST.

Did the trial court commit error in refusing to grant prayer No. 2 of plaintiff in error on the subject of the alleged defective construction of the platform?

In addition to what was said in the main brief, we desire to stress the following:

(*a*) The plaintiff in error did not ask for an instruction to the effect that the platform was not defectively constructed—it was sought to have the court leave that question to the jury.

(*b*) The standard of duty and care which this prayer sought to have the court give to the jury was that of other people engaged in the same line of work, i. e., the character of platform construction usually and generally adopted by others, *provided that actual experience had shown the character of the structure to be ordinarily*

safe; and provided further, that a reasonably prudent man would not have anticipated such an accident from such construction. When this prayer is analyzed, three things must concur before plaintiff in error could be acquitted of the charge of a negligent construction of the platform:

(1) That persons engaged in the same occupation uniformly built platforms of this character in the same way.

(2) That such construction was found by experience everywhere to be safe.

(3) That the character of the construction was such that a reasonably prudent man would not have anticipated injury of the character complained of by the defendant in error.

(*c*) It will not suffice to say that the trial judge cured the error complained of in his general charge to the jury. If the plaintiff in error correctly stated the law in its second prayer, it was well within its legal right to have the court announce to the jury the standard of duty set out in that prayer. The trial judge in his general charge was silent on that particular subject. It may be that what he did say was sound law as far as it went, but it is contended that the plaintiff in error was entitled to have the court furnish the jury a standard by which the conduct of the plaintiff in error could be safely and fairly measured. This right was denied, and hence error is assigned.

SECOND.

Did the trial court commit error in refusing to grant the third, fourth, fifth, and sixth prayers of the plaintiff in error?

The court's attention is particularly called to the following observations:

(*a*) While the third prayer, left to itself, confined as

it was to the conduct of the motorman in stopping the car, may possibly go too far in asking for a verdict for the defendant, the fourth prayer, which was also refused, completely states the case of the defendant in error and should have been granted, if, as a matter of law, the motorman performed his full duty when he commenced to stop the car as soon as he discovered that the defendant in error was unable to leave the track.

(*b*) For the purposes of this case, it is admitted that the motorman did all in his power to stop the car as soon as he saw that the defendant in error was unable to leave the track. This being true, it became a very pertinent question to be answered, how could the plaintiff in error be guilty of negligence in the improper management of the car.

(*c*) The only other acts of negligence alleged in the declaration as to the operation of the car are the failure to give signals and excessive rate of speed just prior to the accident. The motorman testified that when within about 150 feet of the defendant in error and his brothers, he repeatedly sounded his gong (Rec., p. 19). There is no evidence whatever to the contrary.

The car was traveling at about eight or nine miles an hour (R., p. 20). There is no evidence to the contrary. Doubtless this court will take judicial cognizance of the facts that street-cars are allowed by the District regulations to run in the District of Columbia, within the city limits, at the rate of twelve miles an hour, and that there is no limit of speed in the country. At any rate, in the absence of any testimony on the subject, this court will not conclude that a speed of eight or nine miles an hour for a street-car at Riverdale, Md., and on a perfectly straight track is excessive. Counsel for defendant in error vainly suggest that a high rate of speed can be inferred from the fact that the car jolted when it stopped. The motorman testified that

he reversed his current and put on his brakes when he was within 35 or 40 feet of the defendant in error; this would surely have caused the car to jolt quite severely; such a jolt would be felt at almost any speed. Nor can this inference of excessive speed be fairly drawn from the distance the car traveled after the motorman reversed his current and put on his brakes. The motorman himself testified that he was within 30 or 35 feet of the defendant in error when he commenced to stop his car (R., p. 20). The defendant in error and his brothers testified that the car was about 45 feet away when the motorman commenced to stop it (Rec., pp. 10–16 and 17). The contention by counsel for the defendant in error that the car traveled 115 feet is pure guesswork. It is admitted that the motorman began to stop the car when within 35 or 40 feet of the defendant in error, that the boy was somewhere on the platform, and that the car came to a full stop at about the south end of the platform, but it is nowhere stated whether or not reference was made to the rear or front end of the car in this last statement. The most natural inference to be drawn from the testimony is that the motorman succeeded in stopping the car within a few feet of the place of the accident. But even assuming that the car ran the distance stated by counsel for the defendant in error, to wit, 115 feet, that furnishes no evidence whatever that the car was running at an excessive rate of speed. Assuming for the purposes of the argument that the car was running at ten miles an hour, it would traverse the 115 feet in less than eight seconds.

(*d*) In view of the consent finding that the motorman did all in his power to stop the car after he saw that the defendant in error could not leave the track and the further fact, which seems indisputable, that there were no acts of negligence established against the plaintiff in error with reference to the management of the car otherwise, all else must pass out of the case against the plain-

tiff in error, except the single allegation of negligent and defective construction of the platform. If this be true, and if there was error on the part of the trial court in refusing the instruction submitted on that subject by the plaintiff in error, the judgment must be reversed and a new trial ordered.

THIRD.

Measure of Damages.

As will be seen by a reading of the main brief of plaintiff in error, two errors were assigned on this subject:

(1) Allowance of damages for mental suffering.

(2) Allowance of damages for loss of earning capacity.

The first proposition is sufficiently covered in the main brief, and it is unnecessary to add thereto.

There was obvious error, it is respectfully submitted, on the part of the trial judge in telling the jury that damages could be assessed to the defendant in error for loss of his earning capacity. It seems to be well settled law that the earnings of a minor belong to the parent.

In the case of Peppercon *vs.* Black River Falls, 89 Wis., p. 38, it was held that the trial court committed no error in refusing to allow the plaintiff compensation for loss of time during her minority from inability to labor by reason of the injury. The court in substance held that, it not appearing that the minor had been emancipated, the services during the period of her minority belonged to her father and not to her.

In the case of Forsythe *vs.* Central Manufacturing Company, 113 Tenn., 498, it was held that the widowed mother of an infant could recover damages for loss of the services of her son, notwithstanding the fact that there had been a recovery by the infant for damages for the injury to his person. The court said:

> "The right of a parent to maintain such an action is not affected by the previous recovery by the child for injuries sustained by himself."

In Railroad Company *vs.* Young, 81 Ga., 410, it was held that a child could not recover damages for inability to perform labor during minority, where the inability was caused by the injury complained of. The cases in 108 Mo., p. 16, and 119 Mo., page 277, cited in brief of defendant in error, support the contention here that damages for loss of earning capacity, by reason of an injury, are limited to the time after the minor attains his majority. In support of the same proposition the court's attention is called to the following cases:

R. R. Co. *vs.* Boozer, 70 Texas, 530.
R. R. Co. *vs.* Robertson, 16 S. W. Rep., 1093.
R. R. Co. *vs.* Grisom, 82 S. W. Rep., 671.

The plaintiff in error was entitled to have the court state the law to the jury on the subject of damages in plain and simple language, intelligible to the ordinary mind and free from doubt.

D. C. *vs.* Holton, 15 D. C. App., 389.

But in the case at bar the Court of Appeals held that the plaintiff in error had not excepted to the rulings of the trial judge with sufficient definiteness. The court's attention is called to the fact that the plaintiff in error did specifically except to the prayer of the defendant in error which related to the single subject of damages. Of course, a general exception to the general charge has been held over and over again to be too indefinite to furnish a basis for an assignment of error, but that is not the case here, nor does the case at bar come within the reason of the rule just stated. The general charge not only may, but generally does, cover a number of subjects, and the party excepting to it must specifically except to a particular part of the charge, so that each exception will challenge the correctness of one particular proposition. The reason that underlies the practice of separately

numbering prayers submitted by the respective parties is that the court should have an opportunity of passing on one specific proposition of law at a time. Under such a practice an exception taken to the ruling of the court on a prayer submitted, of necessity, challenges the correctness of the court's conclusion on one particular subject, and hence the practice is time-honored of excepting specifically to the action of the court on each prayer. To require the exceptant to do more than this, when he complains of the action of the court on one specific proposition of law, would, of necessity, make difficult and cumbersome the practice and procedure in the courts. If the party excepting to one particular prayer is called upon to point out sentences, or parts of sentences, or phrases, or words, regarded as objectionable, and to furnish a prayer in lieu of the one objected to, and hence, of necessity, to give his reasons for his objections to the one and in support of the other, it will eventuate that arguments of counsel will constitute the average bill of exceptions.

In the case of Moore *vs.* R. R. Co., 2 Mackey, D. C., 449, it was in effect decided that if an exception is specially taken to the granting of each prayer, it will be sufficient. In that case there were three prayers asked for by the plaintiff, and were granted. The counsel for the defendant apparently, as a matter of precaution, excepted generally to the granting of all three of the prayers, but did not take an exception to each prayer separately. The court held that that was irregular, but that it would have been sufficient if the exception to the prayers had been separately noted. In the case of Edgington *vs.* United States, 164 U. S., 364 (referring to an exception to a portion of the general charge), this court said:

> "Some criticism is offered to the exception as made to the whole paragraph, and thus coming

> within cited cases, to the effect that exceptions are not well taken to an entire charge, or to large portions of a charge, if the instructions complained of are, as to some of them, sound. There is a reasonable rule that if the entire charge is excepted to, or a series of propositions contained in it is excepted to in gross, the exception can not be sustained if there were a distinct proposition or instruction given that was sound. Waiving the question as to how far this rule is justly applicable to the case of a charge in a criminal case, we are of opinion that, in the present instance, the criticism is not well founded. The paragraph of the charge excepted to does not contain instructions on separate and distinct propositions, some of which are sound and others not so. The subject treated of in the paragraph is a single one of the proper effect to be given by the jury to the evidence of the defendant's good character. A fair understanding of the meaning of the instruction can not be reached without reading and weighing the entire paragraph. There would have been more room for just criticism had the defendant taken exception to sentences or phrases detached from their connection."

In the case of Brown *vs.* United States, 164 U. S. 224, the court said:

> "The defendant at the time of the delivery of the charge, and before the jury retired, as appears by the bill of exceptions allowed by the presiding judge, alleged exceptions 'to all the remarks of the court in reference to the impeachment of the witness Sam Manus,' and 'to that part of the charge in regard to the evidence of Sam Manus;' and thereby distinctly and sufficiently excepted to the instruction just quoted."

If it be sound law that the defendant in error was not entitled to have damages assessed to him for loss of earning capacity during his minority, the instructions of

the court on that subject were obviously and inevitably misleading. It will not do to say that it was the duty of the jury to skip the whole period of the minority of the defendant in error, which covers a period of over fourteen years, and assess damages from and after that period. The vice of such a proposition is manifest. The jury is entitled to have the law given to it by the court, and it should not be expected to guess the law and then speculate as to its duties and powers in assessing damages. The inability of the defendant in error to earn money during the period of his minority would of necessity be regarded by the jury as a most substantial element of damage, and the error on this particular subject doubtless accounts for the excessive verdict rendered by the jury.

But counsel for defendant in error claim that the father of the child could not now sue in his own name for loss to him of the earning capacity of the child during minority, for the reason that he appeared at the trial of the present case and testified on behalf of his son. The doctrine of estoppel can not be stretched to any such extent as this. This precise point has been decided by the Court of Appeals of Texas.

R. R. Co. *vs.* Grisom, 82 S. W. Rep., p. 671.
R. R. Co. *vs.* Boozer, 70 Texas, p. 530.

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BRIEF FOR DEFENDANT IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

v.

CHARLES E. SEVERE, BY WILLIAM B. SEVERE, HIS NEXT FRIEND.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

On the 31st day of August, 1902, the plaintiff in this case was struck by one of the defendant's cars near Riverdale, Maryland. William B. Severe, the plaintiff's father, lived at Riverdale with his family, consisting of his wife and four children and his own father. At the place where the accident occurred there is a plank crossing which had been constructed by the Maryland Traction Company, the predecessor of the company for which the defendant is receiver. This was done under a contract with the Riverdale Park

Company in consideration of the right of way granted the railroad company through Riverdale (28-29).

It was admitted at the trial "that the railroad company put the planks down that made the crossing in question and that the defendant as its successor is responsible for it" (18).

The track at the point where the plank crossing had been constructed crosses a street which had been laid out, but which was open only to the west side of the track. At the crossing there was no thoroughfare for vehicles, but pedestrians had worn a foot path on the side of the track opposite Riverdale. The crossing was one of the regular stopping places for the cars, there being a sign "Cars Stop Here" on both sides of a telegraph pole at the crossing. And, of course, persons returning from Washington getting off at this place would naturally use the crossing in getting over to the Riverdale side of the tracks.

At the time of the accident, the plaintiff, who is usually called by his middle name, Earickson, was six years and ten months old, and his youngest brother, Raymond, was a little over five years old (15). His brother Eddie was eight years and ten months old. These three were present at the time of the accident.

It is stated in the brief of plaintiff in error "that these and other boys had been in the habit of standing on the track at that and other points in that vicinity until the car got very near them and then jumping off as the car got close to them." While it is quite true there was some evidence to this effect, Eddie and Earickson each testified that he had never done this, and had never seen any of his brothers do it (36-37). It was, therefore, a question for the jury to decide, and it will not do for the appellant's counsel to assume that the jury believed their witnesses and disbelieved the boys.

On the Sunday afternoon in question these boys had gone down to the railroad to meet their parents, whom they ex-

pected to return then from a trip to the seashore (10, 11, 13, 14, 16).

According to the motorman's report, made to the company on the day the plaintiff was injured, the accident happened at a little after 3 o'clock in the afternoon (21). The boys had been notified that their parents expected to return about 2 o'clock that afternoon (13). They went down to the railroad about that time and, according to their testimony, sat or played around what in the evidence is called the Power House, a building a short distance west of the crossing. Thinking they heard a car coming from Washington, they went to the crossing, but their parents did not come at that time. Both Eddie and Earickson testified that at this point Eddie went to his father's house to get a drink of water and did not get back to the vicinity of the crossing until a few seconds before the accident (10, 16). The plaintiff testified that while Eddie was at the house the youngest boy, Raymond, caught his foot in the space between the westernmost rail and the plank on the inside of the rail; that he, Earickson, helped Raymond to extricate his foot, and that almost immediately his own foot got caught in the same place. Raymond ran back to the house to notify Eddie that Earickson's foot was caught. Raymond met Eddie at the gate and the two together ran back to the crossing. When they got there the car was in sight, and before anything could be done to extricate Earickson from his dangerous situation the car ran over his leg and inflicted such injuries that his leg had to be amputated.

The details of the occurrence will be considered in dealing with the several assignments of error.

At the request of the defendant's counsel the jury were instructed, in addition to rendering a general verdict, to state also whether the defendant was guilty of negligence in the construction of the crossing; whether he was guilty of negligence in the management of the car; and whether the motorman did all in his power to stop the car after he saw the plaintiff's foot was caught. The first two questions the jury

answered in the negative, and as to the third the jury could not agree (46).

There was a verdict in favor of the plaintiff for $15,000. The judgment entered on that verdict was affirmed by the Court of Appeals.

If the defendant's counsel had been content with a general verdict they would have been entitled to a new trial in case of any serious misdirection of the jury by the court as to the law bearing upon either of the two points as to which the jury rendered a special verdict; but it is obvious that as the case stands the judgment of the Court of Appeals must be affirmed, unless this court should be satisfied that the trial court erred in giving the law to the jury, both as to the matter of construction and as to the matter of the management of the car.

ARGUMENT.

AS TO THE QUESTION OF DEFECTIVE CONSTRUCTION.

According to the testimony of the plaintiff's father, the space between the top of the rail and the plank was 2 11-16 inches (14, 15). According to Lackey, defendant's witness, whose method of measurement was to try to jam his own shoe-heel into the space, and then go home and measure his heel, it was a scant 2⅛ inches (26). As the rail was a T rail, the space between it and the plank was necessarily wider below the top of the rail. If the construction had been intended for a trap for a child's foot, it could hardly have been made more ingeniously. The extreme danger of such a construction is manifest from the fact that the youngest boy, Raymond, caught his foot in it, and the plaintiff immediately after extricating his brother had his own foot caught in the same place (16).

The principal question of law involved in this branch of the case grows out of the refusal of the trial court to grant

the defendant's fifth prayer (40), which was in substance that if the jury should find that traps of this kind were common among the railroads of this country, and that no accident had before this resulted in the District of Columbia or elsewhere "to the knowledge of the defendant's officers or agents," and that a reasonably prudent man would not have anticipated such *an accident* from such a construction, then their verdict should be for the defendant. This request was also coupled with another instruction (No. 4, 39, 40), which relates to the negligence of the motorman, and which will be hereafter considered.

As to this instruction No. 5, it should be carefully noted in the first place that the instruction itself and all the evidence upon which it was based refers not to whether the feet of little children had been caught in such a trap before, but to whether any *accident* had ever resulted therefrom. So far as the evidence on this point is concerned, it may well be that the defendant's officers knew that every year hundreds of children had had their feet caught at the various crossings in the District of Columbia constructed like the one in question. It is obvious that many children might have their feet caught before one would be hurt, because ordinarily the trolley car is an easily controlled machine, and motormen in general are careful when they see little children on the track.

But a greater objection to the theory of this instruction is that it takes no note of the fact that, whether it was customary or not to leave such a space between the plank and the rail, it was not necessary that that space should be left wholly unfilled. As to that point the defendant's witness, De Rene, testified that he "did not know of any standard about the depth" of the space between the rail and the plank at these crossings.

Mr. Lewin, for the plaintiff, testified that at two plank crossings on the road of this defendant, one at Melrose and one at Hyattsville, the space between the rail and the plank

was kept filled up, so that there was barely space for the flange of the wheels: "that it was like two dies, one fitted into the other;" that if there was a sheet of paper there it could be mashed down by the flange as it crossed: that at the place where the accident happened it was entirely different (37).

And the practically uncontradicted evidence of the plaintiff's father showed that just after the accident the hole where the plaintiff's foot was caught was about two inches deep (15), but that two months afterwards the space between the plank and the rail was filled in with sand and gravel nearly to the level of the board (15, 35).

Mrs. Severe, the plaintiff's mother, saw the railroad men while they were engaged in the work of filling in at the place in question (36).

Absolutely no reason has been shown for maintaining such an obviously dangerous place at a crossing.

Mr. Lackey admits, and of this the court will take judicial notice, that the same cars with the same wheels and the same flanges run through the city streets, and that in the city no such space is required or used for the operation of the flange (27).

Fuller, another of the defendant's witnesses, testified "that the flange at a level with the surface of the wheel was three-quarters of an inch and tapered to practically nothing;" that it is a peculiar shape; it is round rather than coming to a sharp edge; that in the city they have a space for the flange one inch wide (32).

Allen, another of the defendant's witnesses, is a contractor who builds these crossings. He says that the space between the plank and the rail is "left because if anything got in on the track like a piece of ballast, the flange would strike it and press it down so that it would not derail the car; that a piece of stone tightly wedged between the planking and the rail that the wheel could not press down would derail the car; that the space is left for the purpose of guarding against the danger of derailment" (31).

On cross-examination Allen testified in substance that "they have to regulate the size of their space by the size of the stones; that the stones were from two to two and a half inches, and generally gave them a two-inch space, and in the course of time these stones work out on the side; and that you have to keep working on that to keep them in good repair; that if the *stones should work out, it would leave the space deeper*" (31).

Hence, on the showing made by the defendant itself, the space in question is made so that it can be partly filled up with stones and only sufficient space left for the flanges to play, and a space one inch wide is sufficient for that purpose, the flanges themselves being only three-quarters of an inch wide.

The instruction under consideration omits any reference to this fact. It amounted to asking the court to instruct the jury that if it was usual to leave such a space a little over two inches in width the defendant could not be held liable, even though it was customary also to fill up the space, so that a child's foot could not be caught in it, and even though in this particular case the defendant had neglected that duty.

Moreover, it is perfectly plain that the danger could have been obviated without interfering with the safe and convenient operation of the road by the simple expedient of beveling the plank, so as to make the opening wider at the top than anywhere else.

On this point we refer to Spooner *v.* D., L. & W. R. Co., 115 N. Y., 22, in which case, when considering a case almost identically like this, the court said:

"Whether the crossing was defectively built and maintained was properly submitted to the consideration of the jury. The plank at the point of the accident was new and laid parallel with the rail on its inside and two and a half inches therefrom. It was laid with a straight edge, and the opening thus made for the flanges of passing wheels was the one in which the child's foot was caught. The other planks at the same crossing had the edge of the plank parallel to

the rail beveled off or rounded so that at the bottom it touched the rail and the flanges had room to pass, while no opening such as to catch or fasten an incautious foot was left. There is evidence that a similar mode of construction existed at many other crossings of the company, and was uniformly used upon some other railroads, although many retained the straight edges. The beveled edge seems to be an obviously prudent mode of construction, known to the company and adopted by it at this very crossing. It prevents any such possible trap for a child's or a woman's foot as is created by the straight edge, and while such an accident had never before occurred in the history of the company, its possibility was quite obvious to an ordinary observation. Many accidents have occurred from feet becoming caught in a frog, and such incidents should have naturally drawn attention to the similar danger where unrounded plank were laid at crossings. It was not error, therefore, to submit the question of defective construction to the jury."

Other cases of children catching their feet in such an opening and being run down by the cars are Stebenau *v.* R. Co., 155 N. Y., 511, and O'Conner *v.* R. Co., 135 Mass., 352. In the last-mentioned case the court held that instructions substantially the same as the prayers of the plaintiff in error in this case were properly rejected.

In Railroad Company *v.* Stout, 17 Wallace, 661, 662, this court said:

"That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the road-bed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents."

In Union Pac. Co. *v.* McDonald, 152 U. S., 262, 282, 283, this court held that the defendant was liable *as matter of*

law, because of a trap into which a child was shown to have been led in that case.

So in Choctaw, &c., R. Co. *v.* McDade, 191 U. S., 67, it was held that *as matter of law* it was negligence to leave a spout hanging over a railway track in such a way that a person standing on top of a car might be struck by it.

The court of civil appeals of Texas in Gulf, &c., R. Co. *v.* Shelton, 69 S. W. Rep., 363, held *as matter of law* that it was negligence to leave a space of twelve or thirteen inches between the lower step of a railroad car and the edge of a platform where passengers were to alight.

To meet this difficulty counsel for the plaintiff in error claim that whether the construction in question was a dangerous trap or not, the plaintiff in error is not liable because similar traps are in use all over the country. There may be cases like Asphalt Company *v.* Mackey in the Court of Appeals of the District of Columbia (15 App. Cas. D. C., 410), in which it is held competent to show that a piece of machinery is in common use, but such cases have no application here, nor will it avail in such a case as this to offer evidence tending to show that no like accident had occurred before.

It has been held by this court in a number of thoroughly considered cases that, in actions to recover damages for personal injuries, where the question is whether the conduct of the defendant resulting in the accident was negligent, or whether proper care had been used by the defendant in constructing or operating that which caused the injury, it is not competent in many cases to show at all, and in no case is it conclusive, when shown, that such conduct, operation, or construction is in accordance with the general custom and usage in like situations and cases. It was so held in Grand Trunk R. R. Co. *v.* Richardson *et al.*, 91 U. S., 454-469, where the question was as to the usual practice of railroad companies in employing a watchman for a certain kind of bridges; in The

Umbria, 166 U. S., 404-409, where evidence was rejected that it was customary for large passenger steamers carrying the mails to run at full speed in a fog, and that this was really the safer course for them; in Wabash R. Co. *v.* McDaniels, 107 U. S., 454-461, where the railroad company unsuccessfully contended that in selecting its employés it was sufficient to observe that degree of care which other like corporations are accustomed to observe; in Texas & Pac. R. Co. *v.* Dehymer, 189 U. S., 468, where this court, in speaking of the handling of a train of railway cars, said:

"What ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not."

There are innumerable cases in other courts to the same effect.

In Henion *v.* R. R. Co., 25 C. C. A., 223, where the plaintiff while standing on a platform was injured by a passing train, it was held that it was obvious that the platform was too near the rails, and that it was not competent to show that it was the custom of that and other railroads to construct platforms in that way.

In Mayhew *v.* Mining Company, 76 Me., 111, it was held no defense for neglecting to provide a railing around a ladder-hole in a mine that it was not the custom of mine-owners to do so—the court saying that custom and average have no proper place in the determination of what is ordinary care.

In Cleveland, &c., R. Co. *v.* Walter, 147 Ill., 60, 64, the court excluded evidence as to the usual height of bridges on other roads.

In Lake Erie R. Co. *v.* Mugg, 132 Ind., 175, evidence of custom of other companies to maintain the track in the same condition was held properly excluded.

In Hamilton *v.* R. Co., 36 Iowa, 37, the court denied that the particular mode of loading a freight car with timber

shown in that case would not be negligent if that method was used by all railroads.

In Combs *v.* R. Co., 65 Mo., 597, it was held that it was no excuse for leaving a turn-table unlocked that it was the custom of other railroads to do so.

In Helphestone *v.* Medert, 136 Mo., 595, where a grindstone had been run at what was claimed was an excessive rate of speed, evidence was excluded as immaterial and furnishing no defense that the rate of speed of grindstones in other similar factories was the same.

In Champaign *v.* Patterson, 50 Ill., 65, evidence as to a particular construction of sidewalks in other cities and towns of similar size was excluded on the ground that this would be no justification for the defendant's negligence in maintaining such a construction of its sidewalks.

In Louisville, &c., R. Co. *v.* Patterson, 108 Ind., 481, the plaintiff was injured by the giving way of a bridge, which was under repair, while a train was passing over it. The court held that "It was of no consequence whether the appellant used the means and appliances ordinarily used by other railway companies under like circumstances or not, provided they were used in such a manner as to render the bridge unsafe when the train came upon it at the rate of speed shown in this case."

Where a railroad company allowed its employés to throw pieces of wood from a moving train, it was held no answer to the charge of negligence that this had been going on for a long time, and that no one had been hurt before the plaintiff was injured (Fletcher *v.* R. Co., 168 U. S., 135).

In an elevator accident case in which the plaintiff claimed defective construction it was held proper to exclude evidence that no accident of any kind had happened except the one in question during the four and one-half years in which the elevator had been in use (Hodges *v.* Bearse, 129 Ill., 87-91).

Where the plaintiff was injured in Trenton, N. J., by falling into an area opening in a sidewalk, it was held incom-

petent to show that such areas were common in that city; that it was customary to protect them as the one in question was protected; and that over ten thousand persons had passed and repassed the particular area in question annually, ever since it had been constructed, without accident; and that the area was built according to the usual custom (Temperance Hall Association *v.* Giles, 33 N. J. L., 260).

An accident having resulted from the frightening of a horse by a mortar box being left near the highway, it was held incompetent to show that other horses had passed the object and had (or had not) been frightened (Bloor *v.* Town of Delafield, 69 Wis., 273).

A miner having been injured by the falling of an overhanging rock in a mine, it was held no error to exclude evidence that "no accident had ever before happened in the mine" (Burgess *v.* Davis Sulphur Ore Co., 165 Mass., 71).

Where a coupling pin left on a car platform fell off and was struck by a moving car wheel and hurled against the plaintiff, it was held incompetent to show that this result was a kind of accident never before heard of by any one (Doyle *v.* Chicago, &c., R. Co., 4 L. R. A., 420—Sup. Ct. Iowa, 1889).

A railroad employé while helping to make up a train was injured by his foot slipping while he was coupling cars, and his claim was that he slipped because of a defect in the roadway. It was held that the trial judge properly excluded evidence that no other person had ever been injured in consequence of this alleged defect at the place mentioned. "Proof of immunity of other persons from injury would have afforded no sufficient basis for a presumption that the track was sound and safe. 16th Am. & Eng. Ency., p. 457, and cases cited" (Louisville, &c., R. Co. *v.* Kemper, 153 Ind., 618, 663).

In Branch *v.* Libbey, 78 Mo., 321, the plaintiff sued for injuries to himself, his horse, and his vehicle by reason of an alleged defective street crossing. The defendant was allowed

to prove that before and after the plaintiff's accident other persons drove over the crossing without injury. For this error the judgment was reversed, the court holding that evidence as to whether other persons had either passed safely over the alleged defect or had received an injury at that place "is not competent either for the purpose of proving that the way was defective or in suitable condition at the time and place of the alleged injury, or as evidence of the degree of care exercised by the plaintiff," and the court adds that "the entire weight of judicial authority is against the reception of such evidence."

As nearly all the railroads in this country are now controlled by a half dozen men, the contention of counsel for the plaintiff in error here, if sustained by this court, would make those men the judges of what is negligence in railroad construction and operation.

AS TO THE MOTORMAN'S NEGLIGENCE.

There is no question here as to the plaintiff being lawfully on the track when his foot was caught. His parents were expected to return that afternoon, and about the time they were due he and his brothers went to meet them (Eddie, 10, 11; William B. Severe, 13, 14; Mrs. Severe, 15, 16; Earickson, 16).

But without reference to this the plaintiff was lawfully on the track, because he went there to extricate his little brother whose foot had been caught and who was in imminent danger.

The authorities are clear on this point. See Maryland Steel Co. v. Marney, 88 Md., 482-496, in which case the authorities are thoroughly gone over.

The track was perfectly straight for five hundred yards east of Riverdale (Burch, 12). Hawkins, the motorman, as a witness for the defendant, testified that he saw the boys when he was "three or four poles back" (19). He estimates

the distance at about three hundred or four hundred feet, and in this he is corroborated by William B. Severe, who paced off the distance between poles and found it to be between ninety-five and one hundred feet (34).

Hawkins further says that when he was back one hundred and fifty feet he began ringing his gong (19).

Eddie testified that when he came down from the house he, standing a few feet from the track, saw the car coming, and waved his hat, and tried to stop the car; that while the car was still fifty or sixty feet away from him he waved his hat, and was hollering for them to stop (9, 11).

Burch, one of the passengers on the car, says that when he felt the jolt when the brakes were put on he saw two little boys beside the track, and that "they were jumping up and down and hollering" (12).

The plaintiff testified that just before he was hurt he saw Eddie waving his hat up and down and hollering to the motorman; that Raymond came down behind Eddie, and that he was waving, too, both of them, and that he heard Eddie hollering to the man to stop; that he, the plaintiff, was himself waving his hand (16).

Greensmith, a witness called by the defendant, another passenger on the car, says that his attention was called to the motorman by the ringing of the bell repeatedly; that he looked out and saw a larger boy than the one who was injured in the center of the track waving his hand, and that the *next thing* that occurred was that the motorman stopped his car (22, 23).

Bryant, still another passenger called by the defendant, said that he looked out of the car window when it was from *sixty to one hundred yards* from the place where the accident occurred, and that he then saw three boys standing on the platform or crossing. He says he did not think they were near enough for the car to strike them, but they might have been; that he did not continue to look out of the car, but returned to his seat, and had not sat down when the car ran over the boy (24).

Although it was so clearly proved that the boys did warn the motorman that something was wrong, he said in his report to the company, made just after the accident, that no signal was given to him of any kind (21), and he testified at the trial that he did not see either of the boys wave (20). The reliability of this witness' testimony may be judged from the fact that he testified that the boy who was hurt was standing with his face towards him (20). As the boy was facing Washington, with his left foot caught against the rail on the right side of the track, the impossibility of this is manifest. The motorman was also discredited by his stating at the trial that when he rang the bell the boys were running backwards and forwards on the track (20), in which statement he was contradicted not only by Earickson and Eddie, but by the defendant's witnesses, Greensmith and Bryant (9, 10, 16, 17, 22, 24). He was also contradicted by his own report to the company (22).

That the car was going very rapidly is shown by the fact that when the motorman endeavored to stop it there was an unusual and extraordinary jolt. Burch says "that the jolt was unusual enough to make him get out of his seat," that it was the unusual jolt that attracted his attention (12, 13). Greensmith testifies that after he saw the boy in the middle of the track waving his hand the next thing he noticed was the sudden jolt—that there was a jolt, and the car raised up (23).

Bryant says "that the car stopped very suddenly; that he thought that probably caused him to stand there instead of sitting down right away" (24).

Stallings, the conductor, who was on the rear platform of the car, testified "that he noticed the sudden stopping of the car, which was a good deal more sudden than usual" (231).

It is, of course, as usual in these cases, very difficult to fix the distance of the car from the boy when the motorman put on the brakes and reversed the motor. Eddie's testimony was that the car was from 46 feet to 38 feet from

Earickson when he waved to the motorman. In his report to the company the motorman says that when he was about forty feet from the boy, he saw his foot was fast in the track, and immediately applied the brakes (22). In his testimony he said that "when he saw the boy was not going to get off the track, he was about thirty or thirty-five feet away from him."

Burch says that when the car stopped it was about one-half its length beyond the platform (12).

The motorman testified that the car was between thirty-six and thirty-eight feet long. The platform, measured along the course of the road, is about twenty feet wide (34). The plaintiff's foot was caught about the middle of the platform (10).

The distance traversed by the car, therefore, after the motorman was warned was 46 plus 10 plus 38 plus 19 feet, or 113 feet in all. On the motorman's own statement the car traveled over 100 feet after he saw the boy's foot was caught.

We must remember that there were but five passengers in the car, so that its momentum was not great on account of its load; that it was a clear, dry day (21), and that the motorman not only put on the brakes, but reversed the power (19), so that the wheels slipped (Greensmith, 23).

Under these circumstances the plaintiff's counsel might well have asked the court to instruct the jury that as matter of law the motorman was negligent in running down on these children at such a rate of speed.

The general rule applicable to such a situation is stated in 7th Am. & Eng. Ency. of Law, 2d ed., 405 to 408. That rule is that infants under seven years of age cannot be guilty of contributory negligence; that a much higher grade of watchfulness and care must be exercised to avoid injuring young children than would constitute ordinary care towards adults; and that what would be ordinary care towards an adult may be culpable negligence towards a child.

These principles, it is further said, apply with equal force

to idiots, lunatics, and other weak-minded persons, "except that in such cases the very appearance of the person is not necessarily, as it is in the case of children of tender years, a warning to every one that he is not to be held to the adult's standard of ordinary care" (*id.*, 410).

A case illustrating the application of this general principle is Holden *v.* Mo. R. Co., 73 S. W. Rep., 973 (Sup. Ct. Mo., 1903). In that case the motorman of a street car saw a vehicle approaching as if to cross the track in front of his car. He rang his gong, but saw that those in charge of the vehicle did not appear to heed the warning, but drove rapidly on. It was held that in such a case he could not rely on the usual assumption that persons crossing will look and listen, &c., but that he should have got his car under control.

The court of appeals of Virginia applied this doctrine in a case in which, owing to the failure of a motorman in charge of a street car to get his car under control when approaching a frightened horse, an accident happened. In its opinion in that case the court refers to Welsh *v.* Jackson Co. R. Co., 81 Mo., 466, where it appeared that a child was run over and killed by a horse car, and adds:

SLUG SIX.

"Unquestionably greater caution and prudence is required of a street-car company to avoid an injury to a small child on the street than to an adult, for the reason that the servants of the company operating the car may reasonably presume that a person of sufficient size and age, apparently in the possession of all his powers and faculties, will get out of the way of the approaching car, but, when those in charge of the car know, or, by the exercise of reasonable care and prudence, should know, that a person on the track or about to get on the track in front of the car is in such a situation or condition that he is unable to avoid a collision with the car if it continues its course, then, both upon reason and authority, it becomes the duty of those operating the car not only to have the car under control, but, if need be, to stop it in order to prevent injury to the person so situated."

Danville Ry., &c., Co. *v.* Hodnett, 101 Va., 361, 365, 366, 371.

So in Booth on Street Railway Law, section 10 (citing cases in note 6), it is said that a greater degree of caution and vigilance is required to prevent injuries to children and persons who appear to be or are known to be infirm than is required in ordinary cases.

In City Pass. Ry. Co. *v.* Cooney, 87 Md., 261, the facts were that a boy eleven years old was negligently standing on a street railway track with his back towards the point from which the car which injured him came. He started to run just as the car reached him, but stumbled and fell, so that the car struck him, and he lost a leg. In the opinion of the court it is held to be clear that if the motorman saw the plaintiff, or even if by reasonable care he would have seen him, it was for the jury to say whether he could have avoided the accident by getting his car under control. The trial court granted the following instruction at the plaintiff's request:

"That even if the jury should find that there was want of ordinary care and caution on the part of the plaintiff, considering his age and intelligence, as mentioned in the plaintiff's first and second prayers, and testified to by the witnesses, yet the plaintiff is entitled to recover; provided the jury find the other facts set out in the first and second prayers of the plaintiff, and further find from the evidence that the servant or servants of the defendant could have avoided the injury complained of by the exercise of ordinary care and caution after such servant or servants of the defendant saw that the plaintiff was in danger of being struck by the car of defendant, or might by ordinary care and prudence have seen that the plaintiff was in such position of danger."

The following is an extract from the opinion of the court:

"Then, again, if it be true that the plaintiff was standing in the center of the track, with his back towards the car, the question whether the motorman used due care to avoid the accident was also necessarily submitted to the jury. The track was straight between Caroline and Spring streets, with

an unobstructed view of it from one street to the other, and we know of no principle that would permit the court to say that under such circumstances the motorman was not guilty of negligence, assuming, as we have said, the plaintiff's evidence to be true. If he was thus standing on the track the motorman could not have failed to see him if he exercised even a much less degree of care than is required of him, and if he did see him in that position *it was manifestly his duty to check the speed of his car or have it under control*, but the evidence shows that the car was not stopped until it had gone some distance beyond Spring street.

"If the plaintiff did stand with his back in the direction from which the car approached on that track for three or four minutes, as he says he did, he was clearly guilty of negligence. He was eleven years of age, was at that time in the fourth grade of the grammar school he attended, lived near Bank street and went to school on it. Without some evidence that he was deficient in his mental faculties, and there was none, a boy of his age and opportunities must be presumed to know that it was negligence on his part to thus place himself on the railroad track. But, as we intimated above, that would not justify the motorman in running over him. Although the plaintiff may be guilty of negligence, the defendant cannot thereby excuse itself if by the exercise of due care its agent could have avoided the accident after discovering the negligent party in his perilous position. The evidence of the plaintiff's witnesses was amply sufficient to authorize the court to submit the question to the jury. The cases in this State are so numerous on that subject that we will only cite some of those in which street railways have been parties. Arureich's case, 78 Md., 589; McKewen's case, 80 Md., 593; Appell's case, *ibid.*, 603. This rule, which has been adopted as an exception to or modification of the general doctrine that a plaintiff who is guilty of contributory negligence cannot recover, is a very just one, as the law will not permit the loss of life, limb, or even property, to be deliberately and carelessly inflicted, when it could by reasonable care and caution be avoided, merely because the injured person was negligent, but the rule should not be extended too far, but should be kept within proper bounds. When it is clear that the plaintiff was guilty of negligence there must be evidence from which the jury can fairly and reasonably find the defendant liable for violation of duty after the plaintiff

has thus negligently placed himself in danger, in order to avoid the legal effect of his own negligence. But in this case the evidence of the plaintiff shows that the motorman must either have seen him in the perilous position he occupied in time to warn him or stop the car, or must have failed to see him after he had gotten on the track, because he was not using such care as was required of him while thus rapidly moving through one of the public streets of the city. The second prayer offered at the close of the plaintiff's testimony was therefore properly rejected."

By many other courts the doctrine thus laid down by the Maryland court of appeals has been applied in cases where young children have been injured because the persons in charge of a railway car (street or steam) when observing such children on or near the track have taken it for granted they would get out of the way, and failed to get the car or train under control.

Each of the following cases is precisely in point:

Mo., &c., Ry. Co. *v.* Hammer, 78 S. W. Rep., 708 (Tex. Civ. App., 1904).

Louisville, &c., R. Co. *v.* Vanarsdell's Adm'r, 77 S. W. Rep., 1103 (Sup. Ct. Ky., 1904).

Wallace *v.* City & Suburban R. Co., 25 L. R. A., 663 (Oregon, 1894).

Ind. St. Ry. *v.* Bordenchecker, 70 N. W. Rep., 995 (33 Indiana Appeals, 138).

Ind. St. Ry. Co. *v.* Schomberg, 71 N. W. Rep., 237 (Ind. App., June, 1904).

Levinston *v.* Wabash Ry. Co., 170 Mo., 452, 469-471.

Strutzel *v.* St. Paul, &c., Ry. Co., 47 Minn., 543.

Gray *v.* St. Paul City Ry. Co., 87 Minn., 280.

Forrestal *v.* Milwaukee, &c., R. Co., 119 Wis., 495.

THE INSTRUCTION AS TO THE MEASURE OF DAMAGES.

The instruction which is complained of on this point gave the jury to understand in substance that if their verdict should be for the plaintiff they should compensate him (1) for pain; (2) for inconvenience; (3) for mental suffering; (4) for pecuniary loss.

This instruction is in substance exactly the same as an instruction in another case originating in the District of Columbia which was approved by this court. (See W. & G. R. Co. *v.* Harmon, 147 U. S., 571, 573, 584.)

The objection made to this prayer was to it as a whole and not to any part of it. The exception based upon the overruling of this objection cannot, therefore, be sustained if any proposition contained in the prayer is sound.

It is admitted that if the plaintiff was entitled to recover at all he was entitled to recover for pain and inconvenience. The exceptions growing out of the refusal of the court to sustain the general objection to this prayer should, therefore, be overruled (Langdon *v.* Evans, 11 App. D. C., 464; R. Co. *v.* Mackey, 157 U. S., 72).

Again, in Texas & Pac. Ry. Co. *v.* Cody, 166 U. S., 606, the charge on the subject of damages was very general (612, 613). Objection being made to it, this court said:

"If the railway company had desired particular instructions in reference to the measure of damages, it should have requested them, which it did not do."

Earnings.

If, therefore, the defendant's counsel had in this case wished the court to limit the pecuniary loss for which the plaintiff could recover to loss occurring after he should become of age, they should have asked the court to so instruct the jury. If the law be, as they contend, that a minor is

not entitled to money that he earns by his own labor during his minority, then the instruction is technically correct, because it limits the recovery to such loss as *the plaintiff* was reasonably likely to sustain thereafter. Where a question of law is involved, and neither the plaintiff nor the defendant asks for any instructions in regard to it, and the court says nothing about it, the jury must be presumed to know the law, and to render their verdict accordingly.

In Texas & Pac. Ry. Co. *v.* Humble, 181 U. S., 57, 67, in which case a married woman sued for personal injuries and was allowed, pursuant to statute, to recover for loss of earning capacity, it was contended that as the husband was entitled to her services in the household he alone could recover for such services; but this court held that the jury probably understood the instruction as having relation to earnings on her own account, and if defendant wished this to have been more explicit, it should have so requested.

But it is not the law that a minor may not claim and recover his earnings. The law gives that privilege in the first instance to the father, but it is a privilege only and the father may waive it. He does waive it when he brings a suit in the child's name by himself as next friend, and in that way, as well as by his presence at the trial and giving testimony in the case, assists the child to recover the earnings to which he, the father, would be entitled if he should see fit to claim them. This proposition is so clear on principle that it hardly seems necessary to refer to authority on the subject. It will be found, however, that it has been so held in Baker *v.* R. R. Co., 91 Mich., 298, 306; C. & O. Ry. Co. *v.* Davis, 60 S. W. Rep., 14 (Sup. Ct. Ky., 1900); Abeles *v.* Bransfield, 19 Kan., 16, 20.

In R. Co. *v.* Morin, 66 Texas, 225, it was held that the court had erroneously allowed a minor to recover for earnings during minority, but the decision was based on the express ground that not only had the father not relinquished his own claim in that regard, but he had already recovered a

judgment of $7,950 against the railroad company for loss of the son's services.

It is contended in the opposing brief in this case that the jury should not have been allowed to take loss of earnings into consideration, because there was no evidence as to what the earning capacity of the plaintiff was. If sustained, this proposition would mean that in no case can a little child recover for loss of earning capacity because no evidence on the subject is possible. Any member of the jury can make as good an estimate of what that loss will be as any possible witness in the case, because until a child's faculties are developed and it has done something in the way of choosing a vocation in life the whole matter is at large. Nearly all the cases which are cited on this subject in the adverse brief are cases in which the plaintiff was an adult, and no evidence was offered as to his earnings or earning capacity. Of course a different rule would obtain in such a case, because other evidence is possible.

That a child may recover for loss of earnings, and that no evidence on the subject is required, has been held in several well-considered cases. (See Roseakranz *v.* Lindell Ry. Co., 108 Mo., 9, 16, 17; Schmitz *v.* Railway Co., 119 Mo., 256, 269, 279; R. Co. *v.* O'Donnell, 58 Texas, 27.)

Mental Suffering.

Counsel for the plaintiff in error insist that this instruction is erroneous because it allowed the jury to give the plaintiff compensation "for mental suffering, past and future." The objection seems to be that the jury may have been led by this phrase to allow the plaintiff compensation for humiliation and mortification resulting from the consciousness that he is a cripple.

But since it is conceded, as it must be, that mental suffering in general is as proper a subject of compensation in personal-injury cases, as physical suffering, it was the duty of the defendant's counsel, if they conceived that the jury might

be misled by this language, to ask for a definite instruction on that subject. The case of Texas & Pac. Ry. Co. *v.* Humble, 181 U. S., 57, 61, seems to be decisive on this point.

But there are two other replies to this objection. In the first place, the trial court limited the mental suffering which the jury might take into consideration to that which the jury should find "to be the natural and necessary consequence of the loss of his leg." This necessarily excluded mere mortification from disfigurement, because that is not a necessary result of such an injury. In this regard men differ greatly among themselves, and men in general differ from women. Most women on losing a limb would suffer intensely in this way. Some men would; others would not. Many men who have lost a limb make a good living by exhibiting their deformities and asking for alms in consequence of it. It is not even unknown that men have feigned to have lost limbs for the purpose of extracting charity form the compassionate.

But in the second place, if the trial court committed any error in this regard in the instruction in question, it was in not plainly telling the jury that they should allow for injury to the plaintiff's feelings resulting from his being a cripple for life.

In cases of slander and libel, injury to the feelings is the principal and often the only subject of compensation. If it is published of a man that he is a thief, or of a woman that she is a prostitute, heavy damages are allowed for the mortification of being subjected before the community to such imputations. And if a woman by the negligence of another should have her face disfigured, or if a man should be deprived of one of his limbs in the same way, why should there not be compensation for the injury to the feelings in that case, too? While there are some cases which hold to the contrary, the weight of authority is distinctly in favor of allowing damages in personal-injury cases for injuries to the feelings. The law is so stated in 8th Am. & Eng. Ency,

of law, 2d ed., p. 664, and in note 1 to that section. Among the leading cases to the same effect are Heddles *v.* R. R. Co. 77 Wis., 228, 230, 231; Railroad *v.* Wood, 48 Ga., 565, 569, 570; Gray *v.* Washington Power Co., 30 Wash., 665, 673, 674; Chicago, &c., Ry. Co. *v.* Krempel, 103 Ill. Apps., 1.

It is surprising to find that counsel for the plaintiff in error in this brief here have undertaken to state what counsel for this boy said to the jury on this question in the argument. There is nothing in the record on that subject. It is not admitted that appellant's counsel have correctly stated what was said. And whatever was said, they either took no exception to it or did not think it worth while to incorporate it in their bill of exceptions, which is all that need be said on the subject here.

There is no question that besides compensation for physical pain in actions for damages for personal injuries, the plaintiff is entitled to recover for mental suffering, past and future. The general rule on this subject is well stated in 8th Am. & Eng. Ency. of Law, 2d ed., 658; 660, note 1. No evidence is required as to the amount of the damages resulting from mental suffering, that being a question about which the jury is supposed to know as much as anybody else (*Id.*, 659–670; note 2, cases).

In Kennon *v.* Gilmer, 131 U. S., 22, 26, 27, this court held it proper to instruct the jury in assessing damages to take into consideration the plaintiff's "bodily *and mental* pain and suffering taken together," such as "inevitably and necessarily resulted from the injury."

In City of Panama, 101 U. S., 453, 464, an admiralty case in which the court fixed the damages without a jury, it is said that where a suit is brought to recover damages for personal injuries "there cannot be any fixed measure of compensation for the pain *and anguish of body and mind*, but the matter must be left to the good sense of the tribunal which is to fix the plaintiff's compensation."

In District of Columbia *v.* Moulton, 15 Apps. D. C., 363,

367, 368, 379, a personal injury case decided in 1899, the court, speaking through Chief Justice Alvey, said the prayer relating to the measure of damages "was free from any substantial ground of objection." That instruction was as follows:

"The jury are instructed that if their verdict be for the plaintiff, they should allow him: First, reasonable compensation for the physical pain *and mental anguish* which he has sustained in the past *and for that which the jury may find from the evidence he is likely to endure in the future*, as the direct result of the injuries received by him at the time of the accident in question; and, second, the amount of pecuniary loss, if any, which the court may find from the evidence he has sustained in consequence of said injuries by being rendered less able to earn money in the practice of his profession, and also such pecuniary loss of the same kind, if any, as the jury may find from the evidence he is likely to sustain from said cause in the future."

(Moulton's case was reversed here (— U. S., —), but the foregoing instruction was not referred to in the opinion of this court, it being held that the plaintiff could not recover at all.)

In Larmon *v.* District of Columbia, 5 Mackey, 330, 333, the court in general term held that in estimating the damages in a case of this kind the jury are to consider the plaintiff's "pain and suffering, *mental and physical*."

In Nichols *v.* Brabazon, 94 Wis., 549, 552, it was held correct to instruct the jury to compensate the plaintiff for "*mental suffering in the future*, if any, by reason of such physical impairment, if you find that the evidence shows that there will be physical impairment in the future."

In Railway Co. *v.* Sponier, 84 Ind., 165-171, an instruction to the jury was approved in a personal-injury case, which directed the jury if they found the plaintiff was permanently disabled to add to the compensation allowed on other grounds "a just compensation for her *anxiety and distress of mind* as are fairly and reasonably the plain consequence of the injury complained of."

In Fairchild *v.* Stage Co., 13 Cal., 599, it was held proper to instruct the jury to allow damages for the plaintiff's "mental anguish," the court observing that it could not see why compensation should not as well be given for pain of mind as for pain of body.

Other cases to the same effect are Md. Co. *v.* Marney, 88 Md., 482; Ry. Co. *v.* Case's Adm'r, 72 Ky., 736; L. & N. R. Co. *v.* Longsdon, 71 S. W. Rep., 905; 114 Ky., 746; Baker *v.* City of Independence, 93 Mo. App., 169; Ashley *v.* Sioux City, 93 N. W. Rep., 303 (Sup. Ct. of Iowa, 1903); Batten *v.* Transit Co.; 76 S. W. Rep., 727; 102 Mo. App., 285.

Other interesting cases illustrating the tendency of the courts in modern times to allow damages for mental suffering are the following:

Owing to the failure of the defendant to deliver a telegram, the plaintiff was compelled to tramp four hundred miles, suffering on the way great privation and mental distress. The rule as to damages for mental anguish was thoroughly considered by the court, and a long list of cases is cited in support of the proposition that mental suffering is a proper subject of damages with or without accompanying physical suffering. The conclusion of the court is expressed thus: "If mental suffering can be recovered in any case, what difference will it make whether there were physical suffering or not" (Barnes *v.* Wes. Union Tel. Co., 76 Pac. Rep., 931; 27 ev., 438).

Where a woman was ordered out of a place of public resort because she was erroneously taken for a woman of bad reputation, it was held, on great consideration, that recovery could be had for her mental suffering alone (Davis *v.* Power Co., 77 Pac., 209—Sup. Ct. of State of Wash., 1904).

Where plaintiff had reasonable ground for fearing that blood poisoning would result from his injury, it was held that this apprehension on that score was mental suffering, which should be taken into consideration as an element of the damages to be allowed him—as proper an element as the

actual physical injury causing it (Butts *v.* Nat. Exch. Bank, 72 S. W. Rep., 1083—Mo. Ct. Apps., 1903).

So where the plaintiff was bitten by the defendant's dog, and was in fear of hydrophobia, it was held that this mental distress should be taken into consideration in estimating the damages (Godeau *v.* Blood, 52 Vt., 251-254).

Instructing the Jury Not to Exceed the Amount Claimed in Declaration.

In instructing the jury as to the measure of damages, the trial court observed, parenthetically, that they could not allow an amount greater than that claimed in the declaration. As already seen, the exception to this instruction was general—this particular part of the instruction, so far as the record shows, not being called to the attention of the court. In the general charge to the jury, the jury were for the first time informed what is the amount claimed in the declaration—$25,00—and no exception was taken to this part of the charge (45). The court went on and told the jury that the mentioning of the amount claimed in the declaration was not a suggestion to the jury that they should take that as a criterion; that it was only a limit beyond which they could not go; that it was not a suggestion that they should go to that amount, and that the question was simply "what is proper compensation," &c.

Even if there had been a proper exception in the case, the point is covered by the opinion of the Court of Appeals of the District of Columbia in Railroad Company *v.* Hickey, 5 App. Cas. D. C., 436-474.

In T. & P. R. Co. *v.* Cody, 166 U. S., 606, the court instructed the jury in precisely this way, but it seems not to have occurred to counsel in the case or to this court that there was anything objectionable in this method of charging the jury. On the contrary, this court says the instructions in the case gave the law to the jury with substantial correctness.

And on principle, unless a jury is told that they cannot exceed the amount claimed in the declaration, they may fall into the error of rendering a verdict in excess of the amount claimed. In that event the plaintiff is at the mercy of the court; because while the court may reduce the amount in entering judgment it is not obliged to do that, but may grant a new trial. It is the duty, therefore, of the plaintiff's counsel in such a case to see that the jury is informed as to the amount claimed in the declaration, and told that they must not exceed it. If such instruction seems by itself likely to mislead the jury, the defendant's counsel may ask the court to guard against such a result. But, in this case, the court did that of its own motion.

On the whole, it is submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed, with costs.

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FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,

No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

v.

CHARLES E. SEVERE, BY WILLIAM B. SEVERE, HIS NEXT FRIEND, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

A. S. WORTHINGTON,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

v.

CHARLES E. SEVERE, BY WILLIAM B. SEVERE, HIS NEXT FRIEND, DEFENDANT IN ERROR.

Supplemental Brief on Behalf of Defendant in Error.

As to instructing the jury that the verdict could not exceed the amount claimed in the declaration.

There have been intimations in Texas that such an instruction as this is error. See Willis & Bro. *v.* McNeil, 57 Texas, 465, and in Lee *v.* Yandell, 69 Texas, 37. But in the later cases of Railway Company *v.* Burnett, 80 Texas 536, and Railway Company *v.* Stuart, 1 Tex. Civ. App. 645, a contrary conclusion was reached.

In Railway Company *v.* O'Hara, 150 Ill., 577, in which case an instruction of this kind complained of here was given the supreme court of Illinois said:

"That the amount of the *ad damnum* was the maximum beyond which the jury could not go is unquestionably a cor-

rect legal proposition, and we cannot suppose that any jury of ordinary intelligence would regard such reference alone as any intimation by the court that the damage to be assessed should reach or approximate that sum."

Additional Points and Authorities as to Negligent Construction.

1. In the plaintiff's evidence in this case nothing appeared as to the usual mode of constructing such crossings. There was at that stage of the trial a *prima facie* case of negligence. Even, therefore, if the rule as to the usual construction contended for by appellant's counsel were the law, the trial court was required to leave the whole case to the jury as to this question as well as others. This has been recently decided in Kohner *v.* Capital Traction Company, 22 App. D. C., 181.

2. This case cannot be viewed merely as if the alleged negligence in construction and the alleged negligence in operating the car were to be considered separate and distinct from each other. As the motorman must be presumed from having run his car over this crossing so often to know that the "trap" existed, it was his duty to take notice that the boy was standing with his foot in or near it and to be on his guard accordingly. For this reason alone it was negligence in him not to get his car under control.

3. The use of this word "trap" is criticised by appellant's counsel. But in referring to the avoidance of danger in just such a construction by beveling the edge of the plank, the court of appeals of New York in Spooner *v.* Railway Co., 115 N. Y., 22, said:

"It prevents any such possible *trap* for a child's or a woman's foot as is created by the straight edge."

Further, as to the conduct of the motorman in not getting his car under control in time when he saw a little child (or, according to his own statement, several little children) on the track.

In addition to the authorities cited in our principal brief on this subject, we call attention to the recently decided case of Camden Railway *v.* Broom, 139 Fed. Rep., 595. That case was decided by the circuit court of appeals for the sixth circuit, Judge Richards delivering the opinion of the court. It is on all fours with the case at bar, except that in that case the child injured was near the track, instead of on it, until the moment of the accident.

Another very similar case is White *v.* Worcester, etc., Railway, 167 Mass., 143. The child injured in that case was six years old and was in charge of another nine years old, and had its feet caught in a hole in the track.

We have seen that in this case the car traveled considerably over a hundred feet after the motorman saw the boy's foot was caught and put on the brakes.

He testified that he had seen the children when they were several hundred feet away and that he began ringing his gong when he was 150 feet from them. He is presumed to have known in what space he could stop his car, going at full speed. If he waited till he could not stop in time, whatever happened, then the effect would be just the same as though he should not stop at all. Yet the court is asked to hold not only that such conduct would not be negligence, but that reasonable men could not conclude that it was negligence.

Rescuers Not Trespassers.

Besides the case in 88 Md., 482-496, and the authorities there cited, which are given in our principal brief, we refer the court on this subject to 7th Am. & Eng. Ency., 394;

Beach on Contributory Negligence, 2d ed., 58; Linneham *v.* Sampson, 126 Mass., 506; Condiff *v.* Ry. Co., 45 Kan., 256; Ry. Co. *v.* Langendorf, 48 Ohio St., 316; Eckert *v.* Long Island R. Co., 57 Barb., 555; Gibney *v.* State, 137 N. Y., 1; Donahoé *v.* Ry. Co., 83 Mo., 560; Ry. Co. *v.* Lynch, 69 Ohio St., 123; Spooner *v.* R. Co., 115 N. Y., 33. (Counsel here say the court in this last case gave the same instruction which they asked in this case as to the duty of the motorman. We do not agree with them as to this, but in that case the injured child was fourteen years old, so that the case has no application on this point.)

Mental Suffering.

We earnestly insist that on this record the appellant cannot raise the question whether the plaintiff was entitled to recover damages for mental suffering, past and future, arising from the consciousness that he was crippled for life. We contend that the appellant is not in a condition to make this claim for two reasons: (1) Because he did not except specifically to that part of the instruction as to damages which refers to mental suffering, past and future; and (2) because the instruction confines the mental suffering which he may be compensated for to suffering which is "the natural and necessary consequence of the loss of his leg," and if the appellant's counsel conceived that the jury might have understood this instruction to refer to humiliation or mortification, they should have asked the court for a specific instruction in that regard.

In Langan *v.* Weltmer, 64 L. R. A., 969—a case decided by the supreme court of Missouri in March, 1904—plaintiff sued for injuries resulting from the negligent treatment of her case by a magnetic healer. On the measure of damages the court instructed the jury in general terms to take into consideration the plaintiff's physical injury and her bodily pain and mental anguish. This instruction was criticized by the defendant's counsel in the

supreme court of Missouri as being "so general and indefinite as to leave the jury a roving commission to do absolutely as they pleased in reference to the damages." But the court held, citing many cases, that the instruction was good as far as it went, and that if defendant desired to restrict plaintiff's right to recover to more limited bounds, they should have asked for an instruction to that effect.

If *such* mental suffering *is* the natural and necessary result of such an injury, it is the proper subject of compensation; if it is not, then the instruction did not include it. The defendant could not keep quiet, hoping the jury would not include this element of mental suffering intending all the time to insist to the court that they must have included it.

But if the question is properly raised on this record, we confidently maintain that the true rule of law is that in such a case as this the plaintiff is entitled to compensation for the mental suffering growing out of the reflection that he is a cripple, and will always be a cripple.

In the oral argument, counsel for the appellant on this subject referred to Ry. Co. *v.* Dashiell, 7 App. Cas. D. C., 509. In that case the trial court instructed the jury to allow damages for the plaintiff's physical pain and mental suffering, and then instructed them that *in addition* they should allow damages for any impairment of the plaintiff's nervous system from "nervous shock." All that was decided in that case that bears on this case was that mental pain and suffering attendant upon and the natural incident of bodily injury may be taken into consideration in estimating the damages—citing Wood's Mayne on Damages, chap. 73, sec. 64, and note of American editor.

Humiliation on account of a deformity or disfigurement is attendant upon and may be the natural incident of grievous and permanent bodily injury; so far as the case of Dashiell is pertinent here, it is in our favor.

In the oral argument it was said that while injury to the feelings is a proper subject of compensation in actions of

libel, in those cases the element of malice is taken into account, and damages are of a punitive character. Nothing, however, is better settled than that even in an action of libel exemplary damages cannot ordinarily be recovered. Frequently in libel suits, where the plaintiff has been held entitled to recover substantial damages, the defendant has exhibited no actual malice. The law implies malice, which is a way the law has of saying that the plaintiff shall be entitled to recover whether malice in fact existed or not. The application of this principle to the present case was considered in the case of Gas-Light Co. *v.* Lansden, 9 App. Cas. D. C., 508-520-526-537. It was there held that the jury was properly instructed to include damages for the plaintiff's "mental suffering," and that it was especially proper because the court had directed the jury that it was *not* a case in which punitive damages could be allowed. This case was reversed by this court (172 U. S., 534), but this point was not ruled on.

We proceed now to a consideration of the cases bearing directly upon the question of an allowance of damages for mental suffering dissociated from physical pain, but growing out of serious and permanent bodily injury.

The law on this subject is thus laid down in 1st Sedg. on Damages, 8th ed., *sec.*, 47:

"So, where a plaintiff suffers bodily mutilation through the defendant's tort, he may recover compensation for mortification which he has suffered and will suffer by reason of the mutilation and of the fact that he may become an object of curiosity and ridicule among his fellows."

In Heddles *v.* Chicago and N. W. Ry. Co., 77 Wis., 230–the plaintiff's arm was badly injured, it was held proper to instruct the jury to take into consideration in allowing for pain and mental anxiety *the impaired usefulness of the limbs, both past and in the future.*

The italicized words were objected to, but it was held that they were proper because the mental anxiety must have

meant mental suffering, resulting from the consciousness that the plaintiff's arm was disabled for life.

In Heddles *v.* Chicago and N. W. Ry. Co., 77 Wis., 230-231, the court say:

"The first error assigned is the instructions of the court to the jury on the question of damages. The instruction objected to reads as follows: 'The amount of the damages which you will assess is left to your judgment and discretion, considering the proper elements of damages, which are as follows: Adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future, by reason of his injuries; also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows.' The learned counsel for the appellant take exceptions to the use of the words, 'for the mortification and anguish of mind which he has suffered, and will suffer in the future, by reason of the mutilation of his body and the fact that he may become an object of curiosity and ridicule among his fellows.'

"It is urged that these words convey to the jury an idea different from that conveyed by the words 'mental pain and suffering' which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs would naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity and to the thoughtless and unfeeling an object of ridicule. We think there was no error in the instructions excepted to. For authorities sustaining the instructions, see the following cases cited by the counsel for the respondent: Wilson *v.* Young, 31 Wis., 574; Craker *v.* C. and N. W. R. Co., 36 Wis., 657, 677; Power *v.* Harlow, 57 Mich., 107; The Oriflamme, 3 Sway., 397; Atlanta and R. A. L. R. Co. *v.* Wood, 48 Ga., 565; Toledo, W. & W. R. Co. *v.* Baddeley, 54 Ill., 19; Ballou *v.* Farnum, 11 Allen, 73; Western and A. R. R. Co. *v.* Young, 81 Ga., 397; McMahon *v.* N. C. R. Co., 39 Md., 438."

In Power *v.* Harlow, 57 Mich., 119, the trial court instructed the jury as follows:

"You have a right also to take into account the deformity occasioned by the wound and the humiliation that would naturally follow by reason of such injury."

Discussing the correctness of this charge, Cooley, C. J., speaking for the entire court, said:

"Though the word 'humiliation' was not a fortunate one to make use of, there can be no supposition that its use was misleading. There must be more or less of permanent annoyance for the mutilation of a limb, irrespective of the diminished usefulness, and the jury had a right to take this into account. This was all the judge meant."

Mental suffering on account of disfigurement of the person or impairment of the use and symmetry of the limbs have often been held to be elements proper to be considered in assessing the amount of compensatory damages for personal injuries (Nichols *v.* Brabazon, 94 Wis., 549).

In Campbell *v.* Pullman Palace Car Company (42 Fed., 484) the plaintiff, a woman, complained of an indecent assault that had been made upon her by a porter of the sleeping car in which she was traveling. It will be observed that the suit was not against the porter, but against the Pullman Company, so that no question of malice or of punitive damages could arise. (See Woodward & Lothrop *v.* Ragland, 5 App. Cas. D. C., 22). District Judge Shiras in his charge to the jury in that case instructed them to allow the plaintiff compensation for the pain and suffering which had been caused the plaintiff, or might thereafter be caused her.

In the *Oriflamme*, 3 Sawyer, 404, in which case Deady, district judge, sitting in admiralty, himself assessed the damages, he allowed the plaintiff, a servant girl, $500 damages on account of a scar on her forehead, this allowance being in addition to other allowances for pain and suffering caused by the injury.

In Rosenkranz *v.* Ry. Co., 108 Mo. 9, the supreme court

of Missouri held that, where the plaintiff's face and jaws were crushed and disfigured for life, it was proper to tell the jury to allow him compensation (1) for pain of body and mind; (2) for loss of earnings; (3) for any physical disfigurement or deformity, and (4) for any permanent injury other than disfigurement and deformity.

In American Strawboard Co. *v.* Foust, 12 Ind. App., 42, in which case the plaintiff's arm was permanently crippled, it was held that the jury was properly instructed in fixing the damages to take into consideration the plaintiff's bodily and mental suffering, and the fact that he "is deprived of the pleasure and satisfaction in life that those only can enjoy who are possessed of a sound body and the free use of all its members."

In Kendall *v.* City of Albin, 73 Iowa, 241-243, in which case the jury had been instructed to allow compensation for bodily pain and mental anguish in the future, the supreme court of Iowa held the instruction correct, saying:

"If any damages in the future may be recovered, we see no reason why mental anguish caused by the future condition of the injury should not be considered."

In the following additional cases damages for mental suffering growing out of deformity and disfigurement were held properly allowed in personal-injury cases:

Railway Company *v.* Dobbins, 60 Ark., 485.
Newbury *v.* Mfg. Co., 100 Iowa, 457.
Ry. Co. *v.* Young, 81 Ga., 412.
Stewart *v.* Maddox, 63 Ind., 68.
Cameron *v.* Bryan, 89 Iowa, 222.
Schmitz *v.* Ry. Co., 119 Mo., 269.
Ry. Co. *v.* Whetfield, 44 Miss., 496.
Matteson *v.* Ry. Co., 62 Barb., 379.
Ry. Co. *v.* Wood, 48 Ga., 569.
Alexander *v.* Humber, 8 Ky. Law Rep., 619.
Ballou *v.* Farnum, 11 Allen, 77.
Gray *v.* Washington Power Co., 30 Wash., 665-673-674.
And see 8 Am. & Eng. Enc. (2d ed.), 664.

We come now to consider authorities cited on this point by counsel for the plaintiff in error on pages 68 to 72 of their brief, and we take them in their order.

1. Bovee *v.* Danville, 53 Vt., 153:

In that case a woman who had been injured had a miscarriage, resulting in the death of twin children. It was held that, while she could recover for mental suffering at the time of the miscarriage, her injured feelings following it and not part of the pain actually attending it, in the nature of *grief over the loss of her children*, was too remote to be taken into consideration. It may be mentioned, however, in this connection, that under a precisely similar state of facts Judge Lumpkin, speaking for the supreme court of Georgia, reached an exactly opposite conclusion. (See Smith *v.* Overby, 30 Ga., 241.)

2. Chicago and Grand Trunk Ry. Co. *v.* Spurrey, 69 Ill. App., 549:

This case is in point, but it is not a case in a court of last resort. The court disposes of the matter in a single sentence, giving no reason for its conclusion, and refers only to other Illinois cases, only two of which are in the supreme court of the State—Peoria Bridge Association *v.* Loomis, 28 Ill., 225, in which case no such point was made or discussed by the court, and Ry. Co. *v.* Cole, 165 Ill., 334. In Ry. Co. *v.* Cole, 165 Ill., 388, in which it was claimed that the plaintiff's counsel had improperly urged the jury to allow the palintiff damages growing out of his fear that his varicose veins might burst. It was held that the argument was an improper one, but that, as no exception was taken to it, the supreme court could not reverse the judgment. In that case the court held that the trial judge properly instructed the jury to consider "whether or not he [the plaintiff] has been permanently injured, and *also to what extent, if any, he has*

been injured or marred in his personal appearance, and to what extent, if any, he may have endured physical and *mental* suffering as a natural and inevitable result of such injury. * * * And you may consider what, if any, effect such injuries may have upon him *in the future* in respect to pain and suffering."

The distinction which the court seems to make is that, while in such case a plaintiff may recover for mental suffering growing out of his actual physical condition, he may not recover for anxiety about what simply may happen and which is not shown to be even probable. Even to this extent the decision is contrary to the cases cited on page 28 of our principal brief.

As further illustrating the law in Illinois on this subject, we refer to Ry. Co. *v.* Kleinsmythe, 34 Ill., 44. In that case the court refused to set aside a verdict on the ground of excessive damages where the plaintiff's limb was so injured that he could not use it, and the court said it could not hold that the damages were excessive because the jury found that the damages allowed were no more than compensated the appellee for, among other things, the pain endured and *the necessity on his part of passing the rest of his life as a cripple.*

In Ry. Co. *v.* Gemmill, 209 Ill., 641, a personal-injury case, the following instruction was held to be correct:

"The jury are instructed that if you find for the plaintiff in this case you will be required to determine the amount of his damages, and in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them, and the nature and extent of plaintiff's physical injuries, if any, testified about in this case, so far as shown by the evidence, his suffering in body and in mind, if any, resulting from such injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, he will sustain by reason of such injuries."

3. Giffen *v.* City of Lewiston, 6 Idaho, 231:

In this case, as will be seen from the quotation from the opinion given on page 71 of the brief for the plaintiff in error in the case, it was held that the court did not err in instructing the jury to take into consideration as an element of damage the plaintiff's disfigurement. But it further held that annoyance to the plaintiff because of contemplation of his disfigurement was too remote. This is a distinction which is made in no other case, and which is too fine for our understanding. The court indulges in no reasoning on the subject, and does not cite any case.

4. Morse *v.* Duncan, Receiver, 14 Fed., 396:

That case has no application whatever. Plaintiff flagged a train which did not stop. He received no personal injury, and the court simply say that he could not recover for mental suffering, because pain of mind is the subject of damages only when it is connected with personal injury.

5. Chicago, R. I. & Pac. Ry. Co. *v.* Caulfield, 63 Fed., 396:

This case is in point. The court disposes of the matter in a single sentence, giving no reason for its opinion and citing only one case—Bovee *v.* Danville, 53 Vt., 190, the miscarriage case above referred to, which clearly has no relevancy to this question.

On the whole, it is submitted that the overwhelming weight of authority is that mental suffering growing out of a severe and permanent physical injury is not to be excluded in estimating the damages, because it is not accompanied by actual physical pain.

On principle it seems impossible to distinguish mental suffering resulting from deformity and disfigurement from mental suffering growing out of any other physical injury. The cases which hold that mental suffering, dissociated from

physical injury, is not the subject of compensation may or may not establish a correct principle, but they clearly have no relevancy in this discussion.

The absurdities to which the doctrine contended for here by counsel for the plaintiff in error would lead are a strong argument against the validity of that contention. According to their theory, if by reason of a defendant's negligence a female plaintiff had lost part of the flesh of her arm, the damages would be the same as if she had lost her nose, provided the physical pain was the same in the two cases, although in one case the injury done to the plaintiff would be slight, while in the other case it would be enormous.

So according to the theory of opposing counsel, if the defendant has published of the plaintiff that he is a eunuch, for the mental suffering resulting from his being *called* a eunuch, he may recover damages; while, if the defendant by his negligence shall have actually made a eunuch of him, he cannot recover for his mental suffering after his wound has healed.

Fortunately this last proposition is settled for us by the case of Denver, &c., Ry. Co. *v.* Harris, 122 U. S., 597-608. It was there held that where the plaintiff's injury resulted in the loss of the power to have offspring—a loss resulting from the nature of the plaintiff's wound—that that might be considered in estimating compensatory damages.

In fact, this whole discussion might have been avoided by simply referring to the case of Washington and Georgetown R. R. Co. *v.* Harmon, 147 U. S., 571.

In that case the plaintiff had been injured in a street-car accident through the negligence of the defendant. The instruction which the trial court gave to the jury as to the measure of damages is as follows:

"If the jury find for the plaintiff they will find for him such an amount of damages as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time, and the expenses of cure that naturally and proximately

resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience, and the loss of time that he will suffer in the future. In determining this as to the future they will consider plaintiff's bodily vigor and age as shown by the evidence adduced."

Referring to this instruction, as to which an exception had been taken, Mr. Chief Justice Fuller, speaking for the entire court, said (p. 584):

"Another error assigned is that the instruction in relation to damages was objectionable in permitting an award for the future effects of the injury; but there was evidence which justified a finding that future damages would inevitably and necessarily result, and this being so there was no error in the instruction upon that subject."

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Supreme Court of the United States.

No. 244.—October Term, 1903.

Allan L. McDermott, Receiver of the City and Suburban Railway of Washington, Plaintiff in Error,
vs.
Charles E. Severe, by his next friend, William B. Severe.

In error to the Court of Appeals of the District of Columbia.

[May 28, 1906.]

Mr. Justice Day delivered the opinion of the Court.

This is an action to recover damages because of an injury received by Charles E. Severe, an infant, who was run over at a plank crossing of the railway company, the railroad then being in charge of the defendant, operating the same as receiver.

The plaintiff below recovered judgment in the Supreme Court of the District, which was affirmed in the Court of Appeals.

At the place of the accident there was a plank crossing, the planks laid between and on either side of the rails, at a point where a street was opened to the westward, and on the other side of the track a foot path, but no thoroughfare for vehicles. The crossing was one of the regular stopping places of the cars of the street railway near Riverdale, Maryland. The words "Cars stop here" were on both sides of the telegraph pole at the crossing. At the time of the injury plaintiff was six years and ten months old. His youngest brother Raymond was a little over five years of age, and with them another brother, Edward, about nine years old. The injured boy, at the time he was hurt, had his foot caught in a space between the rail and the edge of the plank on the inside. There was testimony tending to show that this opening was two to two and eleven-sixteenths inches wide. The accident happened between two and three o'clock in the afternoon of August 31, 1902. The testimony discloses that the boys had expected to meet their parents returning from a visit, about two o'clock that afternoon, and went to the crossing for that purpose. Edward, the oldest boy, went to his father's house nearby to get a drink of water; while he was gone the youngest boy, Raymond, got his foot caught in the space between the west rail and the plank next the inside of the rail. Plaintiff came to the assistance of his little brother, whose foot he helped to extricate, and was himself caught in the space between the plank

and the rail. Raymond ran to the house to notify Edward that the plaintiff's foot was caught. Together the two boys ran back towards the crossing, and shortly thereafter the plaintiff was struck and so severely injured that it became necessary to amputate his leg below the knee.

In the view we take of this case we do not consider it necessary to state in detail the testimony as to the construction of the crossing and the alleged negligence in leaving the space in which the boy's foot was caught. Under the pleadings and the testimony the jury was directed to return a special verdict upon three propositions: 1. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing? 2. Was the defendant guilty of negligence in the improper management of the car? 3. Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank? The jury answered the first and second questions in the affirmative; being unable to agree on the third, the plaintiff consented that it might also be answered in the affirmative.

In view of these special findings, if the issue concerning either of the first two of them was properly submitted to the jury upon sufficient evidence and found against the company, the judgment of the Court of Appeals must be affirmed.

In delivering the opinion of the Court of Appeals Mr. Chief Justice Shepherd says:

"It is conceded, by reason of the special findings of the jury, that the defendant was guilty of negligence, not only in the construction and maintenance of the crossing, but also in the management and control of the car; that error in the instructions upon both points must be shown in order to obtain a reversal of the judgment, because either finding alone is sufficient support therefor."

It is insisted in argument here that the court ought to have taken the case from the jury because of the insufficiency of the evidence to sustain a verdict. In the view we take of the case as made and submitted concerning the conduct of the motorman at the time of the accident and the instructions given to the jury in that connection, we do not deem it necessary to consider the correctness of the charge submitting the question as to the negligent construction of this crossing. We think the testimony was ample to carry the case to the jury upon the question of the negligent conduct of the motorman at the time of the injury, and that this issue was properly left to the jury under instructions which afford no ground for reversal.

Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different con-

clusions as to the negligence charged, the question is not one of law but of fact, and to be settled by the jury under proper instructions. (*Railroad Company* v. *Powers*, 149 U.S. 43; *Railroad Company* v. *Everett*, 152 U.S. 107.)

In addition to the facts to which we have adverted upon the branch of the case which we deem it necessary to consider, the testimony tended to show that there was nothing to prevent the motorman from seeing the crossing for a distance more than sufficient to have avoided the injury by controlling or stopping his car; that the boy Edward waved his hat and "hollered" for the motorman "to stop," when the car was 50 or 60 feet away. A passenger who was on the car testified that his attention being called by the motorman ringing his bell he saw a larger boy than the one on the track, waving his hand. Another passenger testified that when from sixty to one hundred yards from the place he saw three boys apparently standing on the platform or crossing. Plaintiff says that just before he was hurt he saw his brother waving his hat and "hollering" to the motorman, and that he too waved his hand at the motorman. Witnesses testified that the car when stopped came up with a sudden jolt. There was also testimony tending to show that boys were in the habit of playing at this crossing and running back and forth over it.

The motorman testified that he was in charge of the car and was on the Washington bound track at the time; that he saw the boys when he was about three or four hundred feet away; when he first saw them there were three boys on the track, running and jumping backwards and forwards on the crossing. He sounded his gong when he approached, about one hundred and fifty feet away, and repeatedly thereafter until he reached the boy; when he first saw that the boy was not going to get off the track he was about thirty or thirty-five feet away from him; that he then put on the brakes, reversed the power, and did everything possible to stop the car. He had often seen the plaintiff on the track at that place and on the crossing at Riverdale, Maryland; that he had seen him remaining on the track until the car got close to him, when he would jump off the track, clap his hands and laugh; had seen the plaintiff and other boys do the same thing; the first thing that indicated to him that the boy would not get off the track was when he saw that his foot was caught; that at that time he was from thirty to thirty-five feet from him; that he did not see the boys wave their hands or hats or making any motions to him or did not hear them calling to him. There was testimony tending to show on the part of the plaintiff below that he was not in the habit of playing at this crossing, and that he and his brothers had not been there before in the manner stated by the motorman. The motorman testified further that he saw the boy on the track when he was about three or four hundred feet away.

We are of opinion that in the attitude of the case on this subject it was not error to leave to the jury, under proper instructions, to find whether or not there was negligence in managing the car just before the accident occurred. Upon this part of the case the instructions requested were as follows:

"If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and the plank; and if they shall further find that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant.

"If the jury find from the evidence that the motorman sounded the gong when he was far enough away from the plaintiff and his associates, so that they had sufficient time to leave the track before the car reached them; and if they shall further find that as soon as the motorman saw that the plaintiff would not or could not leave the track before the car reached him, he did all in his power to stop the car before it struck the plaintiff, and shall further find that the construction was not negligent, then they should find for the defendant; and in determining whether the motorman should have commenced to stop the car before he did they may consider the fact, if they find it to be a fact from the evidence that plaintiff and others were in the habit of standing on the track and leaving it as the car approached near them, and whether he saw any waving from any one before he commenced to stop the car."

Upon this subject the court said to the jury:

"On the other question, as to whether the motorman did all that he could possibly do under the circumstances to avert this danger you will have to consider all the testimony, not only that of the plaintiff, but of the defendant, and try to reconcile it so far as you can in order to ascertain where the fact lies. Was it prudent in that motorman, under all the circumstances of the case, to calculate that these children would be off from the track and out of danger when he got there? Or was it requisite for him, as a prudent and reasonable man, to have his car under control so that he could stop very suddenly in case they were not out of danger when he got there? Of course, in determining that question, you are to consider what had been the habit of children about playing at that place. You are not to attribute any contributory negligence to the plaintiff, because this plaintiff is less than seven years of age and the law does not give him discretion. Adults have to look out for children of that kind. But at the same time he may have been in the habit of jumping off and on that track in such a way that the motorman might have been justified in concluding there would be no danger. You are to look at all the surrounding facts and see whether that is true, whether he was justified in that calculation. There was one boy still smaller than the boy who was injured, and according to the motorman's own statement the three boys were running back and forth across the track. It is for you to determine whether or not he should have gotten into close proximity to them with-

out getting his car under such control that he could have stopped very suddenly if necessary to prevent an accident. Of course, after he saw that the boy's foot was caught he must do everything to stop the car. But I call your attention to the time before he could see that the boy's foot was caught and ask you to consider what it would have been prudent for him to do before that time, considering all the surrounding circumstances, considering the formation of this plank crossing, of this track and of this platform, and considering the fact, as the motorman says it was a fact, that children were frequently there running back and forth. Should he have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving or before he saw that the boy's foot was caught? Of course after he saw that the boy's foot was caught it must be his duty to stop just as soon as he can in order to prevent the accident. I have no doubt he did that. But whether he discharged his whole duty towards these children, whom he admits having seen there before that time, is a question for the jury.

"In considering the question of the liability of the defendant on either of the two foregoing grounds, the jury are instructed that they have a right to take into consideration the evidence tending to show that the place where the accident occurred was a public crossing and that it was frequented, and that it was known to the motorman in charge of the car to be frequented, by young children, as well as by older persons.

"It is a question for the jury whether the motorman should have commenced to stop the car sooner than he did, and in determining that question they should take into consideration the fact, if they find it to be a fact, that the plaintiff and other boys were in the habit, at the point in question, of standing on the track until the car was very near them and then jumping off.

"In determining the question of how far the car was from the platform when the boys waved their hands they must be governed by the evidence, and not by speculation."

The substance of the requests of the defendant on this part of the case was that the motorman having sounded his gong far enough away to give warning to the boys in time to get off the track before the car reached them, did all his duty required, provided, that as soon as he saw that the boy could not or would not leave the track, he did all in his power to stop the car before the injury. On the other hand, the court left it to the jury to say whether, under the circumstances shown, the motorman was or was not guilty of negligence in failing to get his car under control, so that in the event of probable injury he could quickly and promptly stop it.

We think the court did not err in its charge in this respect and that the motorman had no right to assume that boys of tender age, such as the plaintiff, might not be caught upon the crossing, notwithstanding his signals, which would have have been adequate to warn one of mature years of approaching danger. Plaintiff was not a wrongdoer. He had gone upon the track with a view of rescuing his brother, and was himself caught and was unable to extricate his foot from the space between the rail and the

plank. It is not contended that he was guilty of any contributory negligence. He was a child of tender years; the testimony is undisputed that children were in the habit of playing at and near this crossing; that they were at the time of the injury in full view of the motorman at least four hundred feet away, at which distance he admits he saw the boys. It was apparent that one of the boys was right upon the track. The jury may have found from the testimony, and the court could not have disturbed that conclusion, that the motorman acted upon the assumption that the boys would get off the track, and though running at a speed of eight to ten miles per hour, made no effort to get his car under control or to stop it, until he saw the boy's foot was caught, when it was too late to do otherwise than run over him. The car, running with electric power, could have been controlled and taken well in hand so as to be readily stopped at the crossing.

This court in *Union Pacific Railroad Co.* v. *McDonald*, (152 U. S. 262, 277,) quoted approvingly from Judge Cooley in a Michigan case: "Children wherever they go must be expected to act upon childish impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly." This view is supported by other well considered cases. (*Powers* v. *Harlow*, 53 Mich. 507, 514; *Camden Interstate Railway Co.* v. *Broom*, 139 Fed. Rep. 595; *Forestall* v. *Milwaukee Electric Railway Co.*, 119 Wis. 495; *Strutzel* v. *St. Paul City Railway Co.*, 47 Minn. 543; *Gray* v. *St. Paul City Railway Co.*, 87 Minn. 280.)

This is not a case of a sudden and unexpected coming of children upon a track. The jury may have found that if the motorman had acted prudently in view of the signals and warnings to stop, which the testimony tends to show were given, and the full view he had of the boys at the time of the accident, checked the car and kept it under control, the injury might have been avoided.

We think, upon principle and authority, the court properly left to the jury to find whether the motorman exercised that reasonable care to avoid injury to the boy which the circumstances of the occasion required. And to have given an instruction as requested by the plaintiff in error, which limited the duty of the motorman to sounding an alarm in time for the boy to get off the track, and to act upon the presumption that he would do so until he found it was impossible for the plaintiff to remove his foot, would have been an unwarranted charge.

It is further urged that the court erred in instructing the jury upon the question of damages. Upon this point the court said:

"The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury, and for the loss of

his leg; for the inconvenience to which he has been put, and which he will be likely to be put, during the remainder of his life in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereinafter in consequence of his being deprived of one of his legs."

The court's attention was not called to any particular in which this charge which covers a number of elements of damages was alleged to be wrong, only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases that an exception of this general character will not cover specific objections, which in fairness to the court ought to have been called to its attention, in order that if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous. (*Baltimore & Potomac Railway Co.* v. *Mackey*, 157 U. S. 72, 86.)

It is now objected that to permit a recovery for a pecuniary loss as covered in the instructions would allow the infant plaintiff to recover compensation for his time before as well as after he has reached his majority, and that during infancy his father is entitled to recover any wages he might earn. If the defendant wished the charge modified in this respect he should have called the attention of the court directly to this feature. The charge in this respect was general, permitting a recovery for a pecuniary loss directly resulting from the injury. It would be very unfair to the trial court to keep such an objection in abeyance and urge it for the first time in an appellate tribunal.

Furthermore, an objection is taken to the charge as to mental suffering, past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect. The court said: "The jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg." Where such mental suffering is a direct and necessary consequence of the physical injury, we think the jury may consider it. It is not unlikely that the court might have given more ample instruction in this respect, had it been requested so to do. But what was said limited the compensation to the direct consequences of the physical injury.

An instruction of this character was sustained in *Washington & Georgetown Railway Co.* v. *Harmon*, (147 U. S. 584.) That there might be more or less continuous mental suffering directly resulting from a maiming of

the plaintiff's person in an injury of this character was probable, and where the jury was limited to that which necessarily resulted from the injury we think there can be no valid objection or just ground of complaint. Of a charge of this character, in *Kennon* v. *Gilmer*, (131 U. S. 22, 26,) Mr. Justice Gray, speaking for this court, said: "But the instruction given only authorized them, in assessing damages for the injury caused by the defendants to the plaintiff, to take into consideration 'his bodily and mental pain and suffering, both taken together,' ('but not his mental pain alone,') and such as 'inevitably and necessarily resulted from the original injury.' The action is for an injury to the person of an intelligent being, and when the injury, whether caused by willfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases." We find no error in the charge in this respect.

As to the alleged error in charging the jury that damages could not be recovered in excess of the sum claimed in the declaration, the court was careful to say to the jury that the sum claimed should not be taken as a criterion to act upon, but that it was only a limit beyond which they could not go. We cannot see how the plaintiff in error was prejudiced by this instruction.

The judgment of the Court of Appeals is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.